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In the Supreme Court of the United States

OCTOBER TERM, 1936

NOS. 221 AND 222

JAMES M. LANDIS ET AL., PETITIONERS

v.

THE NORTH AMERICAN COMPANY

JAMES M. LANDIS ET AL., PETITIONERS

v.

AMERICAN WATER WORKS AND ELECTRIC COMPANY, INCORPORATED

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinions in the United States Court of Appeals for the District of Columbia (AR. 211, NR. 215)[1] were filed June 22, 1936, and are unreported. The opinion of the District Court for the District

[1] In this brief, the record in the American Water Works and Electric Company case is designated AR., and the record in the North American Company case, NR.

of Columbia (AR. 30, NR. 31) was filed January 6, 1936, and is unreported.

JURISDICTION

The judgment to be reviewed was entered on June 22, 1936 (AR. 211, NR. 228). The petition for writs of certiorari was filed July 24, 1936, and was granted October 12, 1936. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

I. *Power.*—Whether the District Court for the District of Columbia has power, temporarily and conditionally, to stay a suit for a permanent injunction in that court, pending the final disposition by the Supreme Court of the United States of a suit instituted in another United States district court involving substantially similar issues of fact and law, although not between the identical parties, if the District Court for the District of Columbia finds the stay necessary to promote the orderly processes of justice and if that court offers the plaintiffs a temporary injunction during the stay.

II. *Abuse of discretion.*—Whether the District Court for the District of Columbia in exercising such power was guilty of an abuse of discretion.

STATUTE INVOLVED

The suits were instituted by the respondents, non-registered holding companies, against the petitioners to enjoin enforcement of the Public Utility

Holding Company Act of 1935 (c. 687, 49 Stat. 803, hereinafter generally referred to as the Act) on the ground that the Act is unconstitutional in its entirety. The provisions of the Act are set forth in the Appendix, separately printed.

STATEMENT

More than forty suits, all having the common purpose of enjoining *in limine* the enforcement of an Act of Congress, had been instituted in various Federal courts throughout the country during November and early December, 1935. Seven of these had been instituted in the District Court for the District of Columbia. Each suit involved questions which would require decision in each of the other suits. The drafting of pleadings and preparation for trials of these cases, each of the magnitude of an important anti-trust action, would necessarily have entailed an elaborate examination of intricate intercorporate relationships, consuming a great amount of time and effort of the courts as well as of the parties.

To avoid the clogging of the court's calendar with a multiplicity of suits prosecuted for a common purpose, and to promote orderly and economical judicial administration, a motion was made on behalf of the petitioners by the Attorney General that the District Court for the District of Columbia should stay its own proceedings in the suits pending before it until a consolidated suit involving substantially the same issues of fact and

law already instituted by the Securities and Exchange Commission (hereinafter generally referred to as the Commission) in another United States district court against certain representative holding companies had been disposed of. The trial court—after satisfying itself that the consolidated suit already begun would completely resolve or very substantially narrow the issues involved in the suits before it, and that the plaintiffs in those suits would be adequately protected in the interim—ordered the proceedings in the suits before it stayed conditionally and temporarily pending the final disposition of the consolidated suit brought by the Commission. The Court of Appeals, with one concurring and one dissenting opinion, reversed the action of the trial court and held in effect that a stay may not be granted in the discretion of the trial court, pending the disposition of another suit, unless the disposition of the suit tried will render the others technically *res adjudicata*.

THE GOVERNMENT'S POSITION BEFORE THE TRIAL COURT

The Government urged before the trial court that the stay of proceedings in the seven suits[2]

[2] The plaintiffs in two of those seven suits are the present respondents. The plaintiffs in four of the other suits have stipulated with petitioners that their suits shall be governed by the disposition of respondents' suits. The plaintiff in the last of the seven suits, after opposing the motion for the stay, ceased to be a holding company within the meaning of the Act, and dismissed its bill of complaint.

filed in that court was necessary to promote the orderly processes of justice for the following reasons:

(1) The terms of section 4 (a) of the Act required certain types of utility holding companies to register with the Commission under section 5 of the Act prior to December 1, 1935, or to refrain from conducting certain kinds of interstate commerce after that date. On December 1, 1935, the Government was confronted with more than forty suits (exclusive of stockholders' suits) filed on behalf of more than one hundred plaintiffs in at least twelve different United States district courts (AR. 77–79, NR 79–81). All of such suits in effect sought to obtain a declaration that the Act was unconstitutional in its entirety and to enjoin the enforcement of the Act against the plaintiff holding companies, none of which had registered under the Act. Seven of these suits had been filed in the District of Columbia, and there was reason to believe that, if the stay were not granted, many other suits would be filed in that District, since virtually all the suits outside of the District of Columbia were jurisdictionally defective as to the petitioners—Government officials resident in Washington—for want of valid service and proper venue (AR. 184–185, NR. 187–188).

(2) While the bills filed against Government officials, including the bills of the present respondents, differed somewhat in detail, all admittedly raised the same fundamental questions of law as

to the validity of the Act (AR. 195–196, NR. 199–200). Each bill admitted that the plaintiff was a holding company within the meaning of the Act and that the Act, if valid, required the plaintiff to register. Although none of the plaintiffs in any of these suits had registered and for that reason none of the specific regulatory provisions applicable solely to registered companies and their subsidiaries was applicable to these plaintiffs, the bills all sought to have the Act in its entirety declared unconstitutional and to have the enforcement of all of its many regulatory provisions enjoined. Although there might be special circumstances affecting a particular company which might, in due course, after the determination of the validity of the registration provisions of the Act, require a judicial determination of the effect of certain specific regulatory provisions of the Act upon that particular company, there was no justification for clogging the calendars and overtaxing the facilities of the courts with complicated and expensive suits when one authoritative decision from this Court could dispose of the major issues of law involved. This was particularly true in light of the fact that the Government had taken every possible precaution to safeguard the rights of the holding companies pending a decision by this Court upon the constitutionality of the Act.

(3) On November 26, 1935, five days before the effective date of the Act, the Commission, pursuant to express authority under section 18 of the Act,

filed a consolidated suit against the Electric Bond and Share Company and the five principal holding companies in the Bond and Share system to compel each of them, *as a holding company in its own right,* to register with the Commission or refrain from certain specified acts in interstate commerce or through the mails. These suits were commenced in the United States Court for the Southern District of New York, the district of the home office of the Bond and Share defendants, before any bills to enjoin enforcement of the Act had been filed in the District Court for the District of Columbia.[3] The Bond and Share system is the best known and one of the oldest of the great public-utility holding-company systems. It controls nearly fifteen per cent of the privately owned electric utility industry in the country. It comes into contact with the Act at more points than any other holding-company system. Moreover, the suit was filed not only against the Electric Bond and Share Company itself but against five of its principal intermediate holding-company subsidiaries as well. Sixteen more holding-company subsidiaries were subsequently added, with the Government's consent, as parties to the suit. Of these twenty-two defendants, thirteen are, by the terms of the Act, required to register with the Commission as hold-

[3] Respondent The North American Company filed its bill later on the same day (NR. 2), and respondent American Water Works and Electric Company filed its bill the following day (AR. 2).

ing companies in their own right; the remaining nine either are not holding companies or are exempt from the Act, as predominantly intrastate companies or as operating companies, by virtue of section 3 (a) (1) and 3 (a) (2).[4] Counsel for the Government informed the trial court that the Bond and Share defendants were preparing an answer and cross-bill which would attempt to contest the validity and enjoin the enforcement of the entire Act in the same manner as the respondents and others were attempting in their suits. Before the Record was made up for appeal, such answer and cross-bill were filed and made a part thereof[5] (AR. 80, NR. 82).

(4) The suits instituted against the non-registered Bond and Share companies would more certainly provide a speedy and effective adjudication of the validity of the Act by this Court than would suits brought by other non-registered companies to

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[4] The Government had also consented to the intervention of five subsidiary companies which are not holding companies but present examples of typical utility and non-utility subsidiaries of a holding company.

[5] By stipulation (AR. 173, NR. 176), the Attorney General, the Postmaster General, and the members of the Securities and Exchange Commission, the defendants in the suits involved in the instant cases, had become cross-defendants to this cross-bill, thereby making all of the defendant-petitioners against whom suits have been instituted in the District of Columbia parties to the Bond and Share suits and ensuring beyond peradventure the right of the Bond and Share companies to contest every provision of the Act and every point of law which could conceivably be raised by the respondents in the suits stayed.

restrain enforcement of the Act and to have it declared a nullity. The suits instituted against the Bond and Share companies were expressly authorized by section 18 of the Act. They were not subject to attack on jurisdictional grounds. In contrast, in the respondents' suits and others brought to restrain enforcement of the Act, the equitable jurisdiction of the court—that is, the justification for application of the extraordinary remedies of equity—was open to serious contest both upon the law and the facts. The disclaimer on the part of Government officials of any intention to prosecute any holding company for violation of the Act raised the question whether there was any case or controversy existing between any holding company and any Government official. *Ex parte La Prade,* 289 U. S. 444; *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70; *Ashwander* v. *Tennessee Valley Authority et al.,* 297 U. S. 288. And the failure of the various holding-company plaintiffs to register raised the question whether they could contest the validity of those provisions of the Act which apply by their terms only to "registered" companies.[6] It was therefore not im-

[6] Section 4 (a) of this Act makes it unlawful for certain types of public-utility holding companies after December 1, 1935, to use the mails or channels of interstate commerce to carry on certain activities unless they shall have filed with the Securities and Exchange Commission, as provided in section 5, a notification of registration and thereafter a registration statement containing certain information regarding their activities and intercorporate relationships. Virtually

probable that after protracted trials in the lower court and successive appeals finally reaching this Court the complaints in such suits would be dismissed upon grounds of equitable jurisdiction without any consideration of the substantive constitutional issues.

(5) To present to a court a true picture of the affairs and position of any holding company, it was important that the court should have before it all of the principal companies in the system of which that holding company was a part. The Government had made all the principal holding companies in the Bond and Share system parties defendant to its test suits and had brought the suits in one proceeding in the Southern District of New York, where all of these defendants had their principal places of business and could be served. In contrast to the Government's care in bringing an entire holding-company system before a single court, it was significant that neither The North American Company nor American Water Works and Electric Company, respondents here, had chosen to join all of the principal holding companies in its system in its suit before the trial court, and that other holding companies in each of these systems had actually brought suits outside of the District of Columbia (AR. 39, NR. 40). Likewise,

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all other provisions of the Act by their terms are applicable only to registered holding companies and their subsidiaries, and are not enforceable against holding companies or their subsidiaries unless and until they do register.

the other plaintiffs in the trial court were but parts of holding-company systems which, through other companies, had instituted proceedings outside of the District of Columbia (AR. 39, NR. 41).

(6) To ensure preservation of the rights of all companies subject to the Act during the pendency of the Bond and Share suits, the Government had taken action in three directions. As a first step—taken before any suits were filed in the trial court—the Commission had issued regulations expressly permitting a holding company when registering to reserve any legal or constitutional right and to stipulate that its registration should be void and of no effect in the event that such a reservation should be judged invalid or ineffective (AR. 40, NR. 41). As a second step—taken before any suits were filed in the trial court—the Attorney General and the Commission had announced that the Commission would take prompt steps to test the Act in a civil suit; that until the validity of the Act had been determined by this Court in such a civil suit, neither the Attorney General nor the Commission would seek to enforce the criminal penalties of the Act; and that even after such determination they would not seek to exact penalties for earlier offenses (AR. 40–44, NR. 42–46). As a third step, the Postmaster General had announced that even if he had the authority he would not exclude any company from using the mails because of any violation of the Act pending the judicial determination of its validity by this Court

(AR. 45, NR. 46). These three steps taken by the Attorney General, the Postmaster General, and the Commission, as just described, had made it perfectly clear that, pending an adjudication by this Court on the Act, no company subject to the Act stood in any reasonable fear of any action or threat of action by any Government official.[7]

(7) To safeguard still further the rights of the respondents during the stay, the petitioners offered in the trial court to submit to a temporary injunction or interlocutory decree which would have the same effect during its pendency as a final decree. The Attorney General proposed that "*such temporary decree may take the same form and have the same scope as a final decree, and such temporary decree will not be vacated unless and until this Court is affirmatively satisfied that the decree is not warranted in fact or in law*"[8] (Attorney General's reply brief in the trial court, p. 3).

THE RESPONDENTS' POSITION BEFORE THE TRIAL COURT

(1) The respondents, and the other five plaintiffs in the trial court, opposed the Government's motion for a stay on the technical ground that, unless the parties and the issues in the suits stayed were identical with those in the suits upon which

[7] This Court has recognized that a disclaimer by enforcement officials of any intention to institute prosecutions under a statute pending an adjudication of its validity may remove the necessity for the intervention of a court of equity. *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89.

[8] Italics in quotations supplied unless otherwise noted.

the stay was to be predicated, the court had no power to stay proceedings in the causes before it, or having such power could not exercise it without being guilty of an abuse of discretion.

In support of their contention that the issues in the Bond and Share suits were not identical with the issues in their suits, respondents relied upon the fact that the Government's suits against the Bond and Share companies sought only to require registration under the Act. Despite the fact that all seven plaintiffs in the trial court had alleged in their pleadings that the provisions of the Act were inseparable and void as an entirety (AR. 13, NR. 18), all such companies assumed at the hearing that the provisions of the Act were separable and that the Bond and Share suits would determine only the validity of the registration provisions of the Act—sections 4 (a) and 5 (AR. 26, NR. 26). In reply the Government pointed out that if the provisions of the Act were inseparable as the respondents and other holding companies had asserted in their pleadings, the Bond and Share cases would necessarily determine the validity of the whole Act; and that if the provisions of the Act were separable, as the respondents argued for the purposes of the motion for the stay, the cross-bill of the Bond and Share defendants would raise the validity of just as much of the Act and in the same manner as the respondents had attempted to do in their suits (AR. 203, NR. 207). If the validity of the Act or

any part thereof could be raised by non-registered companies in actions against non-threatening Government officials, it was clear from the first that the Bond and Share companies by their cross-bill, no less than the respondents by their bills, would raise it.

(2) It was further contended by the respondents that because of different factual setups an adjudication that the Act was constitutional as to Bond and Share would not determine the constitutionality of the Act as to them. Respondents contended that their position was wholly different from that of Bond and Share in that (1) respondents did not transmit a substantial amount of energy in interstate commerce; (2) they had no intercompany service contracts the performance of which might be interstate commerce; and (3) they did not actually control their subsidiaries, through service contracts or otherwise, except by exercising their voting rights as stockholders. In reply the Government pointed out that all three of the above contentions were being asserted by one or more of the several defendants in the Bond and Share suits, and that the respondents' own pleadings as well as official documents (AR. 38–39, NR. 39–40) revealed conclusively that the respondents' situation in these respects was no different from that of one or more of the Bond and Share defendants (see pp. 54–59, *infra*).

Whether the Bond and Share suits were ultimately to be decided in favor of or against the Government, a comparison of the pleadings in the Bond and Share suits with the pleadings in the suits stayed demonstrated beyond doubt that the Bond and Share suits would decide whether the registration provisions of the Act were valid; whether such provisions were separable from other provisions of the Act; whether a holding company could be required to register because of acts done by its subsidiary companies in interstate commerce; to what extent the validity or invalidity of other provisions of the Act might operate as a valid defense for failure to register; and to what extent the validity or invalidity of other provisions of the Act applicable by their terms only to registered companies might be raised by non-registered companies in an independent bill or cross-bill in equity. Such a decision would of necessity define the major issues of law and of fact in the suits before the trial court and would eliminate altogether the need of further litigation or substantially reduce its scope.

(3) Respondents further asserted that the stay would cause them "great and irreparable loss and damage" (AR. 29, NR. 31). In reply, the Government pointed out to the trial court that an unappealed final decree, just as an interlocutory decree, would have to yield to any subsequent de-

cision of this Court, and respondents were unable to answer the trial court's repeated question how under these circumstances, respondents would be better protected by a permanent than a temporary decree (AR. 32–33 NR. 34).

(4) Respondents did not venture to assert that the time of the court should be taken up in the trials of even the seven suits already pending in the District of Columbia. They admitted that all the suits brought to contest the validity of the Act were substantially identical (AR. 195, NR. 199). They offered to select for trial three or four test suits and to be content that a temporary injunction should protect other suitors pending the final determination of such test suits by this Court (AR. 193, NR. 197). But the Government pointed out that the respondents had failed to show that such suits would be as broad or as typical or as free from jurisdictional difficulties as the Bond and Share suits; and that the trial court could take cognizance of such suits pending in another district, there certainly being no necessity for a separate test suit in each district.

THE ACTION OF THE TRIAL COURT

The trial court found both the law and the facts against the respondents (AR. 30, NR. 31). It found that a court has power in its discretion to grant a stay in a pending case, not finally but temporarily, if conditioned upon safeguards ade

quately protecting the plaintiff during the period of the stay, for any cause which furthers the orderly processes of justice. It found that the circumstances surrounding these suits constituted such cause. It found that a decision by this Court in the Bond and Share suits, even if it did not dispose of all the questions involved, would afford a speedy adjudication of the validity of the Act and would certainly narrow the issues and assist in the determination of the questions of law involved in the respondents' suits. It found that the plan proposed by the Government would give the respondents all the protection needed pending a decision by this Court and save a great deal of labor, time, and expense. It found in substance that the respondents' proposal to try only three or four of the suits filed in the lower court and to suspend proceedings in the others, did not offer the same assurance of orderly judicial procedure as did the suggestion of the Government; that the respondents could not answer for the forty cases in other districts which might be transferred to the District of Columbia if the stay were not granted.

The trial court accordingly granted the stay and conditioned its grant upon a diligent and active prosecution of the Bond and Share suits. In view of the assurances of the petitioners, given before the filing of respondents' suits and reiterated at the argument, the trial court did not believe a formal

injunction necessary, but offered the respondents the right to that relief if they desired it. Neither of the respondents, nor the plaintiffs in the other suits below, have as yet sought to avail themselves of that right. The respondents approved as to form the order entered by the trial court (AR. 186, NR. 189). The respondents have not since the entry of the stay-order applied to the trial court for a modification or vacation of the order because of any unexpected development or want of progress in the Bond and Share suits or because of any other development or circumstance subsequent to the entry of the stay-order.

THE ACTION OF THE COURT OF APPEALS

The Court of Appeals reversed the order of the trial court on the ground that the discretionary power of the trial court did not extend to the granting of a stay pending the final outcome of another suit if the suits stayed did not involve the same parties and the same issues and if the stayed suits had not yet technically come to issue.

SPECIFICATION OF ERRORS URGED BY PETITIONERS

The Court of Appeals erred:

1. In reversing the order of the District Court for the District of Columbia staying proceedings in the suits before it to contest the validity of the Public Utility Holding Company Act, pending the final disposition of the Bond and Share suits.

2. In holding that the trial court was without discretionary power to stay its own proceedings in any suit, pending the final disposition of another suit, unless under the principles of *res adjudicata* the decision in the other suit would determine all questions in the suit stayed and the judgment in the other suit would dispose of the controversy in both suits.

3. In holding that the trial court was without discretionary power to stay its proceedings pending the final disposition of another suit before the pleadings in the suit before it were technically closed.

4. In holding that the interlocutory decree offered respondents by the trial court would not during its effectiveness protect the respondents as fully as a permanent decree in the trial court.

5. In holding that the trial court had exceeded its discretionary power in staying proceedings in the suits before it, pending the final disposition of the Bond and Share suits.

SUMMARY OF ARGUMENT

In view of the detailed nature of the Statement (pp. 3–18, *supra*), a further Summary of the Argument appears unnecessary.

ARGUMENT

I

A TRIAL COURT HAS POWER, TEMPORARILY AND CONDITIONALLY, TO STAY A SUIT FOR A PERMANENT INJUNCTION IN THAT COURT PENDING THE FINAL DISPOSITION OF A SUIT IN ANOTHER FEDERAL COURT INVOLVING SIMILAR ISSUES OF FACT AND LAW ALTHOUGH NOT BETWEEN IDENTICAL PARTIES, IF THE COURT FINDS THE STAY NECESSARY TO PROMOTE THE ORDERLY PROCESSES OF JUSTICE AND OFFERS THE PLAINTIFF AN INTERLOCUTORY INJUNCTION DURING THE PENDENCY OF THE STAY

A. INTRODUCTION

The trial court did not grant a stay of the instant proceedings as a matter of right but as a matter of discretion. The trial court in its opinion first found that it had power to grant the stay and then found that the stay ought to be granted in order to promote the orderly administration of justice.

The Court of Appeals held, in effect, that a Federal court has no power to stay its own proceedings pending final disposition of another suit involving similar issues of law and fact instituted in the same or another Federal court unless the issues and parties in both suits are identical and the judgment in one suit will be *res adjudicata* in the other, and that in no circumstances may a stay be granted before the pleadings in the suits to be stayed are closed.

The majority of the Court of Appeals did not review the discretion which the trial court exer-

cised. It is true that there are suggestions in the prevailing opinions reflecting upon the propriety of the trial court's exercising its discretion in the present cases in favor of a stay; but the majority did not actually review the circumstances which influenced the trial court's discretion, because under their view of the law such circumstances were irrelevant. The majority simply found that the discretion of the trial court did not extend to the granting of a stay pending the final disposition of another suit where the parties and issues are not technically identical or to the granting of a stay where the pleadings are not formally closed and issue technically joined. Neither of the prevailing opinions in the Court of Appeals questioned the finding of the trial court that "a decision by the Supreme Court in the Electric Bond and Share case, even if it should not dispose of all the questions involved, would certainly narrow the issues in the pending cases and assist in the determination of the questions of law involved" (AR. 33, NR. 34), or that the stay would "save great amount of labor, time and expense" (AR. 33, NR. 35) for the courts and all parties.

While Justice Van Orsdel and Justice Groner in writing for the majority of the Court of Appeals stated that the trial court had wide discretionary power in the matter of granting continuances and of determining the order in which cases pending on its docket should be tried, a careful reading of

their opinions can leave no doubt that *their reversal of the trial court was based on the ground, not that the trial court had unreasonably exercised its discretion, but that it had acted in a matter to which its discretionary power did not extend.*

Justice Van Orsdel stated that "this power [the discretionary power of the trial court] extends to the determination of which of two cases, pending in the same court or in courts of similar jurisdiction and involving *the same issues and the same parties,* shall be first heard, *but this situation does not obtain in the present controversy*" (AR. 214, NR. 217). Justice Van Orsdel expressly stated "the stay cannot be justified on the ground that the decision in the Bond & Share case may 'simplify' the issues," not because the issues might not be simplified, but because "it is difficult to conclude that a decision of the Bond and Share case would dispose of *all* the issues in the present cases" (AR. 214, NR. 218). And he expressly applied a rule stated in *Rosenberg* v. *Slotchin,* 181 App. Div. 137, 138 (N. Y. 1917), that "it is only where the decision in one action will determine all the questions in the other action, and the judgment on one trial will dispose of the controversy in both actions that a case for a stay is presented" (AR. 214, NR. 218). He also cited the *Rosenberg* case as "authority for the rule that under no circum-

stances will a stay in an action be granted until the issues are made" (AR. 214, NR. 218).

Justice Groner likewise considered it ground for reversal "that a decision in the one case will not foreclose all questions in the other" and stated that "the order entered by the lower court is not such a stay-order as a court ought ever to enter as a matter of discretion" (AR. 216, NR. 220), giving as his reasons the fact that the stay was granted "for an indefinite period" and "where the parties are different and the rights and interests not identical" (AR. 217, NR. 220). Justice Groner also found error in the trial court's action because "the motion was made without bringing the case to issue" (AR. 217, NR. 220).

Justice Stephens, in his dissenting opinion, rejected the proposition that the trial court's discretion was limited by any rigid, technical requirement, reviewed at length all the considerations which might have influenced the trial court's discretion, and concluded that the trial court's decision was reasonable.

The differences among the justices in the Court of Appeals must therefore be ascribed to their disagreement as to the rules which define the limits within which the trial court has power to exercise its judicial discretion.

The effect of the decision of the Court of Appeals is to oblige a trial court to proceed, either

simultaneously or in succession, with the trial of a multitude of similar suits brought for a common purpose, without permitting the trial court to await the outcome of an appeal to this Court in one suit which promises to eliminate the need of any further litigation or at least to obviate the necessity of long and protracted trials and successive appeals. The decision prevents the trial court from adopting a procedure which will conserve much time, labor, and expense, even though such procedure is attended by appropriate safeguards reasonably calculated to protect the substantive rights of all litigants. The decision of the Court of Appeals makes it impossible for the Government, or any other defendant against whom substantially similar actions have been brought by different plaintiffs, to avoid preparing and trying a multiplicity of almost identical suits, although the trial of one representative suit followed by an appeal to this Court would eliminate the burden and expense to the courts and to the litigants of a score of suits. It limits the control of the trial court over its own process by a fixed and arbitrary rule bearing no relation to the orderly and economical administration of justice.

It is the position of the Government that the Court of Appeals erred in so circumscribing the power of the trial court with rigid requirements that the issues and parties be technically identical and that the pleadings be formally closed.

B. THE COURT OF APPEALS ERRED IN RULING THAT THE TRIAL COURT HAS NO POWER TO GRANT A STAY WHERE THERE IS NOT A TECHNICAL IDENTITY OF PARTIES AND ISSUES

The decision of the Court of Appeals that the power of the trial court to stay a suit before it pending the disposition of another suit is limited to suits "involving the same issues and the same parties" (AR. 214, NR. 217) is in direct conflict with the authoritative decisions of this Court. While it is true that one of the most frequent uses of the stay has been to prevent a multiplicity of suits between the same parties in respect of the same issues, the decisions of this Court demonstrate that there is no narrow, technical rule that the issues and parties must be identical in all respects in each suit in order that the proceedings in one suit may be stayed or postponed until after the disposition of another suit.[9] The power of a court

[9] Even when an independent bill is brought seeking affirmative relief in equity to enjoin a multiplicity of suits, there is no rigid rule that the parties or issues must be identical. *Di Giovanni* v. *Camden Ins. Assn.*, 296 U. S. 64, 70. In the *Di Giovanni* case Mr. Justice Stone stated (296 U. S. at 70): "Avoidance of the burden of numerous suits at law between the same or different parties, where the issues are substantially the same, is a recognized ground for equitable relief in the federal courts. See *Ogden City* v. *Armstrong*, 168 U. S. 224; *Hale* v. *Allinson*, 188 U. S. 56. But the award of this remedy, as of other forms of equitable relief, is not controlled by rigid rules rigidly adhered to regardless of the end to be attained and the consequences of granting the relief sought. It rests in the sound discretion

to grant a stay of a suit before it pending the outcome of another suit is an incident of a court's "inherent power to control the progress of the cause so as to maintain the orderly processes of justice." *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379, 382.

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of a court of equity and a theoretical inadequacy of the legal remedy may be outweighed by other considerations."

Mr. Justice Peckham stated in *Hale* v. *Allinson*, 188 U. S. 56, 78: "We are not disposed to deny that jurisdiction on the ground of preventing a multiplicity of suits may be exercised in many cases in behalf of a single complainant against a number of defendants, although there is no common title nor community of right or interest in the subject matter among such defendants, but where there is a community of interest among them in the questions of law and fact involved in the general controversy."

It is true that an independent bill to enjoin a multiplicity of suits in other courts is quite different from a mere stay of proceedings pending the disposition of a suit in another court. An independent bill to enjoin a multiplicity of suits takes the suits enjoined finally away from the jurisdiction of the other courts and usually requires them to be tried in one consolidated proceeding. Yet despite the difficulties present in a consolidated trial involving different causes of action between different parties, there is, as the decisions of this Court show, no rigid rule that an independent bill cannot be maintained in equity to avoid a multiplicity of suits where the parties and issues are not the same. But a mere stay of proceedings pending the disposition of another case involves no such trial difficulties nor does it affect the jurisdiction of any other court. The identity of issues and parties need not, therefore, bulk so large in the exercise of the court's discretion in staying *its own* proceedings, and the court, in exercising its discretion, has much more latitude to consider the interests of the parties and the economies of competing procedures.

In *Kansas City Southern Railway* v. *United States*, 282 U. S. 760, this Court clearly indicated that the use of the stay, by a court in respect of its own proceedings (as distinguished from affirmative relief against proceedings in another court), to prevent needless multiplicity of suits by *different* parties against the Government, pending the final disposition of a suit begun in another Federal district, rests in the sound discretion of the trial court. The *Kansas City Southern* case involved two general orders of the Interstate Commerce Commission which were applicable to all interstate carriers coming within their terms. The orders related to the movement of cars of one carrier upon the lines of another. One group of carriers attacked the orders in the United States District Court in Kentucky. Another group of carriers attacked the orders in the United States District Court in Missouri. After a decree in favor of the Interstate Commerce Commission had been rendered in the Kentucky case, the Government amended its answer in the Missouri court setting up the decree in the Kentucky court as an affirmative defense equivalent to a plea in abatement. On appeal from a decision of the Missouri court refusing the Government's plea, this Court held that, while the Missouri court could not be deprived by a plea in abatement of jurisdiction once it had been properly invoked, the Government's plea, considered as a request to the Missouri court to stay its

own hand, could properly have been granted. Since, however, the stay was not seasonably urged, this Court refused to overrule the Missouri court's exercise of discretion in denying the stay. Mr. Chief Justice Hughes stated (282 U. S. at 763–764):

> *We find no provision of the applicable statutes which deprives a District Court of jurisdiction of a suit brought by a party entitled to attack an order of the Interstate Commerce Commission in accordance with these provisions as to venue. But the existence of jurisdiction does not mean that it must be exercised and that grounds may not be shown for staying the hand of the Court.* Compare *Langnes* v. *Green, ante,* p. 531. The appellants, upon proper application could have been allowed to intervene in the earlier suit brought for the same purpose in the District Court for the Western District of Kentucky (U. S. C., Tit. 28, Sec. 45a) and could have presented there all of their grounds of attack upon the orders in question. The orders of the Interstate Commerce Commission may apply throughout the country, and there may be cases where the convenience of the parties and the interests of justice may make appropriate separate suits by different parties affected by the same order. *The question is thus one for the sound discretion of the District Court, in which such a suit is brought, to*

determine whether it should be permitted to continue or proceedings therein should be stayed, pending the final outcome of an earlier suit for the same purpose, to the end that there may not be a multiplicity of suits without substantial reason. As, however, the defendants here did not raise the question of the pendency of the earlier suit until the day of final hearing, several months after the suit was begun, we see no reason for disturbing the action of the District Court in this respect.[10]

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[10] It is true, as respondents pointed out to the Court of Appeals, that by special statute the plaintiff carriers in the Missouri proceeding would have been entitled to intervene in the Kentucky proceeding. This Court did not, however, suggest that the existence of a right to intervene was a prerequisite of the power of the trial court to grant a stay. This Court discussed the privilege of intervention only by way of taking due cognizance of the Government's point that such privilege was a reason for treating the Kentucky decree as a *bar* to the Missouri suit. This Court ruled in effect that although the orders of the Interstate Commerce Commission might apply throughout the country, and there might be cases where the convenience of the parties and the interests of justice might make appropriate separate suits by different parties affected by the same order, the right to intervene in distant proceedings was a statutory privilege which was not intended to compel intervention or to prejudice the right of the carriers to institute separate proceedings in their domiciliary jurisdiction, to protect their own interests.

But this Court did not say that the separate suits which the carriers had a right to institute—and which might in the circumstances have been appropriately instituted in their domiciliary jurisdictions—could not be *stayed* pending the final disposition of a similar suit brought by different

The order of the Interstate Commerce Commission attacked in the *Kansas City Southern* case affected many different railroads and was thus similar in its effect to the Holding Company Act, which affects many different utility holding companies. The incidence of the same order of the Interstate Commerce Commission upon one railroad may be quite different from its incidence upon another railroad differently circumstanced. Yet there can be no question, since the *Kansas City Southern* case, that a suit in one court contesting the validity of an order of the Interstate Commerce Commission may, in the discretion of that court, be stayed pending the final disposition of another suit begun in a different court by a different plaintiff to contest the validity of the same order as applied to it.[11]

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carriers in a different jurisdiction. To the contrary, this Court took care to indicate that while such suits were not *barred* they could be *stayed*. It is particularly significant that this Court did not confirm, although it might have confirmed, the action of the trial court on the technical ground that the Government had no right to plead in abatement the decree in the earlier suit between different parties. To the contrary, this Court considered the Government's plea as a request for a stay, and confirmed the action of the trial court on the broader ground that such action was a proper exercise of its discretion in refusing a stay not seasonably requested.

[11] In *Friedman* v. *Harrington*, 56 Fed. 860 (C. C. Mass. 1893), the circuit court for Massachusetts granted a stay in a suit before it under circumstances almost identical with those which confronted the trial court in the instant proceeding. In the *Friedman* case, the plaintiffs sued state officers to restrain the enforcement of a statute designed to limit, if not completely abolish, the oleomargarine trade in the state.

In the recent case of *Pennsylvania* v. *Williams*, 294 U. S. 176, this Court went so far as to emphasize that a refusal by a trial court to stay its own hand will constitute an abuse of discretion if such refusal would be prejudicial to the public interest. Mr. Justice Stone stated (294 U. S. at 185):

> *A court of equity, which in its discretion may refuse to protect private rights when the exercise of its jurisdiction would be prejudicial to the public interest,* see *Greathouse* v. *Dern*, 289 U. S. 352, 359, 360, or deny relief upon performance of a condition which will safeguard the public interest

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The plaintiffs were wholesale dealers in oleomargarine, sold only in the original packages in which they were brought into the state. The statement was made by the attorney general representing the defendants, and not denied by the plaintiffs, that no prosecution had been brought under the law against a dealer in the original packages, and it was not proposed to bring any until the constitutionality of the law had been passed upon by the Supreme Court in certain test cases. The circuit court stayed the case on the ground that two similar suits, testing the statute as applied to the business of *other* plaintiffs, were pending before the Supreme Court. The court stated that "as this question can only be settled by a decision of the Supreme Court, I must decline to pass upon the question at this time, and direct that the case be continued until the next term of this court" (56 Fed. at 861). The court stressed the point that the stay could not hurt the plaintiffs because the state officials did not propose to enforce the law against sales in the original package until the constitutionality of the Act was settled—a situation exactly analogous to the announced intentions of the Government in respect of the enforcement of the Holding Company Act during the pendency of the Bond and Share suits.

> and secure substantial justice to the complainant, see *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334, 338, *would seem bound to stay its hand in the public interest where it reasonably appears that the private right will not suffer.*

The words of Mr. Justice Stone are particularly applicable to the present suits, where the interlocutory decree offered the respondents ensures that their private rights will not suffer (see pp. 66–85, *infra*). See also *Gordon* v. *Ominsky*, 294 U. S. 186; *Penn General Casualty Co.* v. *Pennsylvania*, 294 U. S. 189.

This Court has further held that in appropriate circumstances a federal court may be required even to relinquish its jurisdiction in favor of other proceedings. As Mr. Chief Justice Hughes stated in *United States* v. *Bank of New York and Trust Company*, 296 U. S. 463, 480:

> The statutory grant of jurisdiction to the District Court leaves open the question of the propriety of its exercise in particular circumstances. Even where the District Court has acquired jurisdiction prior to state proceedings, the character and adequacy of the latter proceedings in relation to the administration of assets within the State, and the status of those assets, may require in the proper exercise of the discretion of the federal court that jurisdiction should be relinquished in favor of the state administration. *Pennsylvania* v. *Williams*,

294 U. S. 176, 185; *Gordon* v. *Ominsky*, 294 U. S. 186, 188; *Penn General Casualty Co.* v. *Pennsylvania*, *supra*, p. 197. * * *

Certainly if the orderly administration of justice may in proper circumstances require a district court to relinquish its jurisdiction, there is no arbitrary rule which denies a district court the right in a proper exercise of its discretion to stay its own proceedings to obviate the necessity of protracted trials and successive appeals, if that discretion is exercised with fullest regard for both the public and private interests involved.[12]

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[12] There is nothing in *Commonwealth Trust Company* v. *Bradford*, 297 U. S. 613, cited by respondents in their answer to the petition for the writs of certiorari, which qualifies the rule of discretion enunciated by this Court in the cases above referred to. In the *Commonwealth Trust Company* case, a receiver for an insolvent national bank, which prior to the receivership had held as trustee for itself and the holders of participation certificates a pool of certain real estate mortgages, had brought a suit for an accounting in the Federal district court against the successor-trustee of the mortgage pool. The successor-trustee had been appointed by a state court of appropriate jurisdiction with the consent of the receiver who had desired to relinquish control of the mortgage pool. But the mortgage pool was not insolvent; and the assets of the pool were in the possession of the successor-trustee and not in *custodia legis*. There being no suit for accounting pending in the state court, the successor-trustee could not and did not ask for a stay, but sought a dismissal of the Federal suit to force the receiver to bring his suit for an accounting in the state court. Since the Congress had expressly given the receiver the right to bring his suit for an accounting in the Federal court, and since there was nothing in the record to indicate that the matter was being, or could more appropriately be, litigated in another forum, the mo-

The prevailing opinions of the Court of Appeals passed over these authoritative decisions of this Court and relied on language from two opinions of an inferior New York court, which announce the rule that a trial court under New York practice is without power to grant a stay-order pending the final disposition of another suit unless the pleadings in the suit to be stayed are technically closed *and* unless the issues and parties are so identical that a final judgment in the one suit will be *res adjudicata* in the other. *Rosenberg* v. *Slotchin*, 181 App. Div. 137 (N. Y. 1917); *Jenkins* v. *Baker*, 91 App. Div. 400 (N. Y. 1904). Such application of rigid, technical rules to the power of a Federal court to grant a stay is contrary to the decisions of this Court and to the basic principles which this Court has evolved to ensure the power of the Federal courts to control the orderly processes of justice. Whether the pleadings have or have not been technically closed, whether any of the parties will or will not suffer material injury from the stay, the decision of the Court of Appeals, if not modified, will deprive the District Court for the District of Columbia of all power and discretion to control its

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tion to dismiss was denied by the trial court and the denial was affirmed both by this Court and the circuit court of appeals. The opinion of this Court in the *Commonwealth Trust Company* case casts no doubt upon the power of a Federal court, upon a proper showing, to stay its own proceedings pending a litigation in a state court, just as it has always had the power, upon a proper showing, to stay its own proceedings pending litigation in another Federal court.

own calendar to prevent numerous trials involving similar issues of law and fact whenever all the parties and issues are not technically identical.

C. THE COURT OF APPEALS ERRED IN RULING THAT THE STAY WAS FOR AN INDEFINITE PERIOD OF TIME

The prevailing opinions of the Court of Appeals are further in direct conflict with the opinion of this Court in *Kansas City Southern Railway* v. *United States,* 282 U. S. 760, in so far as such opinions suggest that the stay was improvidently granted because it was "for an indefinite period of time" (AR. 214, NR. 217). Justice Groner, in his concurring opinion, dwells particularly upon the "indefinite" character of the stay. He expressly states that "the order entered by the lower court is not such a stay-order as a court ought ever to enter as a matter of discretion" and that the stay-order was not "temporary" but "for an indefinite period," and was therefore "substantially an injunction against these plaintiffs" (AR. 216–217, NR. 220). Yet, the very type of stay-order which Justice Groner found defective, this Court expressly stated would be proper in the *Kansas City Southern* case—that is, a stay "pending the final outcome" of another suit. The stay took the only form it could have taken to accomplish its purpose—that is, the avoidance of unnecessarily long and burdensome litigation in numerous suits of a similar nature and having a common purpose.

The stay, being interlocutory, was at all times within the control of the trial court to vacate or revise for any good cause (*Perkins* v. *Fourniquet,* 6 How. 206, 209, *Fourniquet* v. *Perkins,* 16 How. 82, 85), and its indefiniteness, if there were any, was an indefiniteness dictated by the vigilance of the trial court to stand ready at all times to alter or vacate the stay as justice might require, to adjust its decree to the exigencies of the situation, and to protect the interests of the litigants to the fullest extent.

As Justice Stephens stated in his dissenting opinion in the Court of Appeals (AR. 221–222, N.R. 225):

> As to the length of the stay, it is suggested that it is never to end except upon the determination in the New York suit of the validity of the Act by the Supreme Court of the United States, or until the termination of that suit otherwise. The stay motion was in such terms, literally, made, but it was not in such terms granted. * * * The opinion indicates that the stay was granted for a definite purpose and upon definite conditions. The purpose was the saving of a "great amount of labor, time, and expense" through a prior decision in the New York suit, which "even if it should not dispose of all the questions involved, would certainly narrow the issues in the pending cases and assist in the determination of the questions

> of law involved."[13] The conditions were "a diligent and active prosecution of the Electric Bond and Share case." * * * The order is interlocutory in nature and therefore remains within the control of the court which made it. If, during the progress of the New York suit it is made to appear to the trial court that the purpose of the stay will not be served, or that its conditions are not being fulfilled, the trial court may, and I think it should be assumed will, terminate the stay.

D. THE COURT OF APPEALS ERRED IN RULING THAT THE TRIAL COURT IS WITHOUT POWER TO STAY A CAUSE BEFORE IT WHEN THE PLEADINGS ARE NOT TECHNICALLY CLOSED

The holding of the Court of Appeals that the trial court is without power to grant a stay in a suit before it when the pleadings are not technically closed, finds no support in the decisions of this Court and is contrary to sound equity practice. But in any event, the time of the granting of the stay goes not to the question of the power of the trial court but to the question of the reasonableness of the exercise by the trial court of its discretion. So long as the trial court and the litigants are fully

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[13] [Justice Stephens' footnote] "Presumably the court had in mind the saving of labor, time and expense not only for the parties and counsel but also for itself, a court of the same sovereignty as, and a court of parallel jurisdiction with, the United States District Court for the Southern District of New York."

informed of the issues in the cause, whether by technical pleadings or otherwise, and can thereby fully compare the cause with the case in the other court, there can be no reason in equity for holding that a request for a stay is premature. Equity looks to the substance and not to the form. To have waited until the pleadings were actually closed would have added nothing to the proceeding.

The detailed allegations of each of respondents' long and complicated bills, in so far as they related to the particular holding-company system of each plaintiff, could not have been intelligently answered and countered by cross-bills by the Government without careful and long investigation and study. Hasty answers to these bills could have been no more than general denials. Indeed, had the Government asked for time to investigate the facts in order to frame full and adequate answers and cross-bills before requesting the stay, it might later have been met with the objection which was decisive in the *Kansas City Southern* case, *supra*—to wit, that the stay had not been seasonably requested. Far from being premature in its motion for a stay, the Government carefully followed the procedure indicated by this Court in the authorities upon which the Government relied.

Moreover, the Government carefully detailed to both the trial and appellate courts the issues which would be raised in respondents' suits, and referred both courts to carefully prepared official, governmental reports and documents to indicate that the

issues discussed by the Government were put forward in good faith and were not merely contentious. The respondents at no time suggested that there had not been a complete and adequate statement of the issues. In fact, the issues were more fully detailed and explained to the trial court in the Government's and respondents' arguments and briefs than would have been possible in any formal pleading.[14]

The conclusion is inescapable from the authoritative decisions which we have reviewed that the *power* of the trial court to grant a temporary and conditional stay is not limited by the narrow or technical rules prescribed by the decision of the Court of Appeals in this proceeding. The recent decisions of this Court indicate that the granting

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[14] As Justice Stephens stated in his dissenting opinion in the Court of Appeals (AR. 219–220, NR. 223): "In the technical sense the pleadings were not closed; that is to say, at the time the motion to stay was presented to the trial court, no answers had been filed in either the local suits or in the suit in New York. But it is to be borne in mind that the stay was not asked for upon the ground that a decision in the New York suit would, in the technical sense, be res judicata as to the local suits. This it could not be, for lack of technical identity of parties. The proposition advanced was that the rulings in the New York suit would be practically fruitful to simplify, if not to dispose of, the local litigation. In this view I think formal answers are not the only data which a court may properly consider in reaching a conclusion. It may consider oral representations and documents, apparently informative and reliable. Such data the trial court had before it through the Attorney General, counsel for the Commission, and the plaintiffs' counsel."

of a stay rests in the sound discretion of the trial court, a discretion to be exercised with care and with caution, but with regard to the substantial requirements of justice, and not in accordance with any rigid rule. A court, of course, may not lightly grant a stay which would hurt, prejudice, or delay the rights of the party stayed to the decree or judgment which he seeks. But questions of choice of a proper forum, avoidance of a multiplicity of suits, identity of parties and of issues, closing of pleadings, order of trial of related issues, and numerous other problems affecting the orderly processes of justice are not matters of rule but of judgment. There certainly is no rule in the Federal courts today which makes it impossible for a court, particularly a court of equity, temporarily and conditionally to stay its *own* proceeding if it has reason to believe that by so doing it will, without substantial hurt or prejudice to the parties, obviate the need of fruitless and burdensome litigation or of unnecessarily long and protracted trials.[15]

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[15] THE CASES RELIED UPON BY THE RESPONDENTS ARE NOT APPLICABLE—

As against the recent authoritative decisions of this Court discussed by the Government, respondents in the Court of Appeals cited a number of opinions in the state and lower Federal courts. Analysis of these cases demonstrates that the decisions in most of them may be clearly supported as a proper exercise of the court's discretion in the particular circumstances involved. As Justice Stephens observed in his dissenting opinion below, "they differ so substantially in their facts from the instant problem that they do not constitute persuasive rulings" (AR. 223, NR. 227). Respond-

ents' reliance is chiefly upon *dicta* in these cases, which upon examination are found either to be inapplicable to a proceeding like that at bar or to have been based upon doctrines expressly disavowed by this Court.

The opinions upon which respondents placed most reliance date back fifty and seventy and a hundred years. The orderly disposition of judicial business today involves quite different considerations than it did fifty and a hundred years ago when litigation was of a particularly local character and travel and communication slow and cumbersome. Procedural questions as they were presented to a Maine Circuit Court in 1838 (*Wadleigh* v. *Veazie*, Fed. Cas. No. 17031 (C. C. Me. 1838)), a Massachusetts Circuit Court in 1864 (*Loring* v. *Marsh*, Fed. Cas. No. 8514 (C. C. Mass. 1864)), a Vermont Circuit Court in 1879 (*Mercantile Trust Co.* v. *Lamoille Val. R. Co.*, Fed. Cas. No. 9432 (C. C. Vt. 1879)), a California court in 1881 (*Dunphy* v. *Belden*, 57 Cal. 427 (1881)), or a Texas court in 1889 (*Cates* v. *Mayes*, 12 S. W. 51 (Tex. 1889)), afford little guidance to a modern equity court. Indeed, where, as in certain of these early cases, the term "stay" meant a plea in abatement, the opinions confuse rather than illuminate the issue (*Wadleigh* v. *Veazie*, Fed. Cas. No. 17031 (C. C. Me. 1838), *Loring* v. *Marsh*, Fed. Cas. No. 8514 (C. C. Mass. 1864)).

Moreover, virtually every case cited by respondents below was brought to recover money or property; while the present suits are brought, and can be brought, solely for protection against future conduct of Government officers. In each case cited by respondents below, the court was asked to rule that one party must wait until some other time for relief to which it might have a present right. In the instant cases, however, the protection requested has been already granted. This basic distinction between a suit to recover property and one to obtain protection against future conduct—a protection fully accorded by a stay coupled with an interlocutory injunction—is a difference too great to be spanned by mere numbers of cases.

The Federal opinions upon which respondents relied before the Court of Appeals concern primarily questions involving the concurrent jurisdiction of state and federal

courts. For years the lower Federal courts applied a rule that they could in no case stay their jurisdiction in favor of the jurisdiction of a state court unless the proceeding were one *in rem* and the state court already had possession of the property. Recent decisions of this Court, however, have authoritatively established that these questions of concurrent jurisdiction are matters of discretion—not matters of power. Furthermore, in a recent decision in which the earlier rule of *power* was followed, the Circuit Court of Appeals for the Sixth Circuit expressly recognized that the rule was limited to cases involving the concurrent jurisdiction of state and federal courts as distinguished from courts of a single sovereign. *Great North Woods Club* v. *Raymond*, 54 F. (2d) 1017 (C. C. A. 6th, 1931). Thus, the federal precedents upon which respondents relied are without weight in this proceeding because they proceeded upon the early doctrine that a Federal court has no power either to abdicate or defer its jurisdiction in favor of a state court—a doctrine now discredited by this Court and further inapplicable to a proceeding like the present where the question is one regarding the jurisdiction of two Federal courts.

The recent cases clearly show the progress of Federal courts from *rule of thumb* to *exercise of discretion* in the matter of granting stays pending litigation in another forum. In *McClellan* v. *Carland*, 217 U. S. 268, this Court held that the granting of a stay by a Federal court pending litigation in a state court was an abuse of discretion, remediable by mandamus, but in remanding the case expressly authorized the circuit court of appeals to consider the special circumstances which may have moved the trial court in granting the stay. Yet a number of lower Federal courts in decisions cited by respondents (*Checker Cab Mfg. Co.* v. *Checker Taxi Co.*, 26 F. (2d) 752 (N. D. Ill. 1928), *Jefferson Standard Life Ins. Co.* v. *Keeton*, 292 Fed. 53 (C. C. A. 4th, 1923)), overlooked the qualification regarding special circumstances that this Court affixed to its decision in the *McClellan* case and proceeded on the earlier doctrine of lack of power adopted by the Court of Appeals in the instant proceeding. This Court accordingly, in recent years, has had expressly to discredit the doctrine of these cases cited by respondents and to make

it clear that the *McClellan* case is not to be construed as limiting a court's discretion in appropriate circumstances to stay its hand in favor of a state court. In *Pennsylvania* v. *Williams*, 294 U. S. 176, this Court had to reverse a unanimous opinion of a circuit court of appeals as well as the decision of a district judge (72 F. (2d) 509) for failure to relinquish jurisdiction in favor of a state proceeding in appropriate circumstances. Most of the decisions of the lower federal courts relied upon by respondents below are consequently so entangled with questions regarding the concurrent jurisdiction of Federal and state courts as to have no real bearing on the issues before this Court.

State decisions on pleading and procedure turn so much upon local statutes and local practice that they have never been given much, if any, weight out of their own jurisdiction. The Conformity Act by its terms exempts "equity and admiralty causes" (28 U. S. C. 724), and this Court has many times asserted that the rules of procedure in a Federal equity court "are not determined by local laws or rules of decision, but by general principles, rules and usages of equity having uniform operation in those courts wherever sitting." *Guffey* v. *Smith*, 237 U. S. 101, 114. State authorities are particularly inapplicable where, as here, they are cited to rebut authoritative pronouncements of this Court. Federal equity courts have always kept their rules free from the technicalities of state procedure and have done equity according to their own understanding of that term.

II

THE TRIAL COURT WAS NOT GUILTY OF A MANIFEST ABUSE OF DISCRETION IN STAYING TEMPORARILY AND CONDITIONALLY RESPONDENTS' SUITS

In the instant proceedings, the trial court, after reaching the conclusion that it had the *power* upon a sound exercise of its discretion to stay its own proceedings, did not grant the Government a stay as a matter of right, but weighed with care conflicting considerations of a complicated character and competing interests of public and private right (see pp. 16–18, *supra*).

The majority of the Court of Appeals, however, did not examine carefully into the considerations and interests which had moved the District Court in the exercise of its discretion because under their view of the law it was not necessary to determine whether there had been a manifest abuse of that discretion. As Justice Groner stated very succinctly in his opinion: "But I mention these matters merely in passing. In my opinion the order entered by the lower court is not such a stay-order as a court ought ever to enter as a matter of discretion" (AR. 216, NR. 220). Justice Stephens in his dissenting opinion reviewed the considerations which moved the trial court and concluded not only that the Record was barren of any proof which would justify a reversal on the ground that

the trial court had unreasonably or arbitrarily exercised its discretion, but that the Record showed that (AR. 224, NR. 227):

> The decision of the trial court—permitting an adequate and comprehensive test of an act the meaning and constitutionality of which it was important to the public at large to have determined, but permitting this upon terms which gave to the plaintiffs in large part what they would have gained by immediate and successful trial of their causes (thereby minimizing the consequence of postponement thereof), probably saving the parties and counsel and the courts much duplication of labor and expense, and keeping the Supreme Court of the District of Columbia free to carry on, in the usual course, its general judicial business—was a reasonable decision, properly within the scope of the trial court's discretion.

Unless a trial court has appropriate power to control the progress of cases before it to maintain the orderly processes of justice, judicial administration passes from the control of the trial court and becomes subject to skillful manipulation and abuse. If rules of procedure are to be flexible and adjustable to the varying demands of modern litigation, the trial court must of necessity have broad discretion, and the judgment of the trial court in matters of procedure should not be reversed unless the record reveals manifest error. It is not the

accepted practice in the Federal courts for the appellate court to review the exercise of the trial court's discretion as upon a trial *de novo*; the sole question for the appellate court is whether upon the record there has been a manifest abuse of discretion. It is not the practice for an appellate court to substitute its own discretion for that of the trial court. Discretion necessarily involves some scope for judgment on matters as to which there is room for reasonable difference of opinion. And the judgment of the trial court in exercising its discretion ought not to be disturbed unless that judgment at the time it was made was clearly unreasonable or arbitrary.

In determining whether the action of the trial court constituted a manifest abuse of discretion, this Court should find it helpful to examine into the following questions as bearing upon the reasonableness of the discretion which the trial court exercised. Those questions are therefore discussed in this Part II of the Argument in the following order:

A. Is there any reasonable ground to suppose that the stay of the respondents' suits until after the disposition by this Court of the Bond and Share suits will substantially simplify and reduce, if not dispose of entirely, the issues of law and fact to be tried in respondents' suits?

B. Do the Bond and Share suits afford a reasonable basis for a comprehensive and prompt test of the Act?

C. Does the stay, as allowed, expose the respondents to any damage from which a permanent decree of the trial court could protect them?

D. Is the Government's action less fair or less conducive to the orderly testing of the constitutionality of the Act than the action of the respondents?

A. THE TRIAL COURT HAD REASONABLE GROUND TO BELIEVE THAT THE STAY OF RESPONDENTS' SUITS UNTIL AFTER THE DISPOSITION BY THIS COURT OF THE BOND AND SHARE SUITS WILL SUBSTANTIALLY REDUCE AND SIMPLIFY THE ISSUES OF LAW AND FACT TO BE TRIED IN RESPONDENTS' SUITS

The respondents in their suits seek to restrain the enforcement of the Act by the petitioners on the ground that the Act is unconstitutional in its entirety. The Government in its suits against the Bond and Share companies seeks to compel thirteen holding companies in the Bond and Share system to comply with the registration provisions (section 4 (a) and section 5) of the Act; and the Bond and Share companies set up as a defense that the Act is unconstitutional in its entirety, and they further, by cross-bill against the Government and against the individual petitioners, seek, as have the respondents, to restrain the enforcement of the Act and to have it adjudged unconstitutional in its entirety (AR. 80–175, NR. 82–178).

Respondents, in their petition to the Court of Appeals for allowance of the special appeal, admitted that all seven suits stayed by the trial court

were "a number of substantially identical suits" (AR. 195, NR. 199); that the bills in all these suits sought, "on substantially the same grounds, the same relief sought" by the respondents (AR. 191, NR. 195); and that "the same or similar relief has been sought in different United States District Courts by a large number of other corporations which are also holding companies within the definition of the Act" (AR. 191–192, NR. 195). The respondents urged that a comparison of their bills with the Government's bill in the Bond and Share suits would show that the issues sought to be raised in their bills against Government officers were broader than those sought to be raised in the Government's bill against the Bond and Share companies (AR. 193, NR. 197). But the respondents did not then show, and have not since sought to show, that the issues raised by the answer and the cross-bill of the Bond and Share companies against the Government and the petitioners as cross-defendants in the Bond and Share suits are less broad and less comprehensive than those raised in the respondents' own bills against the petitioners. Nor can it be urged, once it is conceded that all seven suits brought against the petitioners in the trial court "are substantially identical," that the cross-bill brought by the Bond and Share companies against the petitioners is not substantially identical with the respondents' bills. The prevailing opinions in the Court of Appeals apparently did not consider the substantial identity of the

issues presented by the Bond and Share cross-bill and those presented by the respondents' bills, but compared only the issues presented by the respondents' bills against the petitioners with the issues presented by the Government's bill against the Bond and Share companies. As Justice Van Orsdel stated: "We think, from an examination of the bills in the present cases and the bill in the Bond & Share case, which appears in the record, that many questions arise in the instant cases which would not and could not be disposed of in the Bond & Share case" (AR. 213, NR. 217); but Justice Van Orsdel made no reference to the cross-bill in the Bond and Share suits, which was also in the Record (AR. 96ff., NR. 99ff.).

The Attorney General on behalf of the petitioners had informed the trial court that the Bond and Share defendants were preparing an answer and cross-bill to contest the validity of the entire Act to the same extent and in the same manner as respondents were attempting in their suits (AR. 204, NR. 207–208). Before the Record was made up for appeal the Bond and Share cross-bill was filed and made a part thereof (AR. 80ff., NR. 82ff.). The Bond and Share cross-bill conclusively establishes that the representations of the Attorney General as to the issues which would be raised in the Bond and Share suits were true and well-founded, and that the suggestions of the respondents that their suits presented the question of constitutionality in a much broader and more

comprehensive way (AR. 193, NR. 197) and as applied to more typical situations, were not well founded. Of course, if the progress of the Bond and Share suits ever fails to meet the reasonable expectations of the trial court, it cannot be supposed that that court will not modify its interlocutory order as equity may require.

Respondents have not denied that if the Government loses in the suits brought against Electric Bond and Share Company and its principal subsidiaries there will be no necessity to try the present suits. But the respondents, fearing that the Act, which they have solemnly averred in their bills of complaint to be wholly unconstitutional and void, may after all be constitutional in its application to Bond and Share and its subsidiary holding companies, urge that a decision of this Court will not necessarily dispose of the respondents' suits.

The Government has not contended that the decision in the Bond and Share suits would, in a technical sense, be *res adjudicata* in the respondents' suits. But the Government submits that all the major issues raised by the respondents' suits will of necessity be disposed of by this Court's decision determining the constitutionality of the Act as to thirteen different holding companies in the Bond and Share system. Even if there should be any minor or incidental issues of law or fact in the respondents' suits not completely resolved by the decision of this Court in the Bond and Share

suits, which eventuality is highly problematical, there can be no question that the decision of this Court will precisely define and delimit the nature and scope of these issues so that they may be promptly and readily disposed of without the necessity of protracted and elaborate litigation. The Bond and Share suits were instituted by the Government for the very purpose of seeking test suits upon all the principal and typical kinds of situations presented by the Act. In so far as the respondents, with or without reason, urge that their situations are different and peculiar, they are merely pointing out to this Court that their situations are not typical situations and do not present appropriate suits for the initial testing of the Act.[16]

[16] The question whether the Act is valid in all particulars as against certain non-utility subsidiary companies of respondent American Water Works and Electric Company, for instance, is obviously a question that may more appropriately be determined after this Court has determined whether the Act can validly be applied to a subsidiary company solely on the basis of the interstate business in which the parent holding company is engaged directly or through one of its other subsidiary companies. That question is squarely presented in the Bond and Share suits. Indeed three allegedly typical non-utility subsidiary companies have been allowed to intervene in the Bond and Share suits (AR. 173, NR. 176). Furthermore, it is pertinent here in considering the equities in the American Water Works situation to point out that Rule 3D–5 promulgated by the Commission on November 25, 1935, following conferences with American Water Works and Electric Company officials, extends a broad exemption to certain non-utility subsidiaries. Rule 3D—5, Holding Company Act, Release No. 24, November 25, 1936.

As the Government has indicated, the respondents do not deny that if this Court finds the Act unconstitutional against all the Bond and Share companies their suits need not be tried. And the respondents cannot deny, nor do the prevailing opinions of the Court of Appeals deny, that whether the Bond and Share suits are decided in favor or against the Government, they will decide many issues in the respondents' suits. They will decide, as Justice Stephens pointed out in his dissenting opinion below (AR. 221, NR. 224–225), whether the registration provisions are a valid exercise of Federal power; whether the registration provisions are separable from the other provisions of the Act;[17] whether a utility holding company may be required to register because of acts done by its subsidiaries in interstate commerce; to what ex-

[17] On this point of the relation of separability to the Bond and Share suits and to their own suits, as on many other points in this proceeding, the respondents have tried to blow both hot and cold. For the purpose of offering an excuse to the courts below, as courts of equity, for bringing suits before complying with simple registration provisions, they have *pleaded* that the registration provisions *are not separable* from other provisions of the Act (AR. 13, NR. 18). For the purpose of trying to show a substantial difference between the scope of the issues which can be raised in their cases and in the Bond and Share cases, they have *argued* that the provisions of the Act *are separable*, that the Bond and Share suits will not put in issue section 11 and the other sections of which respondents complain, and that the Act may be constitutional as applied to the Bond and Share companies but unconstitutional as applied to respondents (AR. 26–27, NR. 26–27).

tent the validity or invalidity of any other provision of the Act may operate as a valid defense for failure to register;[18] and to what extent the valid-

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[18] Respondents may argue, as they did before the Court of Appeals, that the Government's reply to the answer and cross-bill in the Bond and Share suits (filed subsequent to the making of the Record in this proceeding) restricts the issues in those cases to the registration provisions. It is true that the Government takes the position in that reply, as it has consistently in this and every other Court, that the registration provisions of the Act are separable and that the Bond and Share defendants cannot raise the validity of every other provision of the Act which may at some time or under some conditions become applicable to them. Federal courts do not render advisory opinions. The Government further takes the position that if the Bond and Share companies are found to be legally and constitutionally obligated to register, equity will not accord them affirmative relief from provisions of the Act which are by their terms applicable only to registered companies, until they have at least absolved themselves from their unlawful conduct by complying with the registration provisions. It argues that a court of equity should not hesitate to apply this equitable doctrine to companies like the Bond and Share companies who joined with the respondents and other companies in making representations to the Congress, through the Committee of Public Utility Executives representing virtually the entire industry, that the industry was not opposed to appropriate federal regulation of utility holding companies in general or to the registration provisions of the proposed Act in particular. Whether that position of the Government shall prevail, will, of course, be determined by this Court in the Bond and Share cases. But it is hardly necessary to point out that, if respondents' suits go to trial, the same question would be raised by any answer which the Government could be expected to interpose in the present cases, and the same determination would be required of the courts below and of this Court as this Court will make in the Bond and Share suits. The Government so indicated in its briefs before both the

ity or invalidity of any other provision of the Act may be brought in issue—by independent bill or by cross-bill—by non-registered companies seeking to enjoin the enforcement of the registration and other provisions of the Act and to have the Act declared unconstitutional. Each of these issues is presented in the respondents' suits, as well as in the Bond and Share suits, and this Court's decision on each of these issues in the Bond and Share suits will both practically and legally dispose of them in the respondents' suits.

To add color for their contention that the issues in the Bond and Share suits are not substantially identical with the issues presented in their own suits, respondents pointed to various alleged factual differences between their own holding-company systems and the Bond and Share systems. The argument discreetly ignores the fact, which the Government very carefully stressed, that the Bond and Share suits involve thirteen differently circumstanced holding companies, doing business in a variety of ways and presenting various typical situations and problems under the Act, including all the typical situations in respondents' systems.

The alleged factual differences relied upon by the respondents boil down to assertions that, as distinguished from the Bond and Share companies,

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trial court and the Court of Appeals. If the Government's reply will restrict the issues in the Bond and Share cases, a Government answer would have the identical effect in respondents' cases.

(a) the respondents do not transmit a substantial amount of energy in interstate commerce; (b) the respondents have no intercompany service contracts the performance of which might be interstate commerce; and (c) the respondents do not actually control their subsidiaries, through service contracts or otherwise, except by exercising their voting rights as stockholders. As the Government pointed out to the trial court, each of these differences proves upon examination to be largely if not wholly illusory.

(*a*) *Interstate transmission of electric energy.*—The respondents are not themselves operating utility companies, but they have subsidiary companies which are engaged in the continuous transmission of electric energy across state lines in substantial amounts (AR. 38, NR. 40). Like the respondents, many of the holding-company defendants in the Bond and Share suits do not themselves transmit gas or electric energy in interstate commerce but do so through their subsidiary companies. To be specific, Bond and Share, American Gas and Electric, Electric Power and Light, American Power and Light, National Power and Light, United Gas Corporation, Power Securities Corporation, and Lehigh Power Securities Corporation—each of which is severally a defendant in the Bond and Share suits—allege, as the respondents allege, that they are not operating public-utility companies and do not themselves transmit gas or electric energy in interstate commerce, but do so

only through subsidiaries one or more steps removed (AR. 109–111, NR. 112–113). Like the contentions of respondents (answer to petition for writs of certiorari, p. 16n.), the pleadings of the Bond and Share defendants assert that their operating subsidiaries are engaged primarily in the intrastate business of generating and distributing electric energy or producing and distributing gas solely within the states in which they operate and only incidentally, if at all, in interstate commerce (AR. 111, NR. 113–114). The amounts of electric energy transmitted across state lines in both of the respondents' systems are very substantial, being in the case of North American about one-fifth of all the electric energy generated, and in the case of American Water Works nearly one-fourth (AR. 38–39, NR. 40); in the case of the Bond and Share companies the interstate transmission averages less than one-third of the electric energy generated by the system (AR. 49, NR. 51). Both the absolute and relative amounts of such interstate transmission done by the different subsidiaries of the respondents and the various Bond and Share defendants naturally vary greatly. House Interstate Commerce Committee Report,[19] Part 3, p. 50 ff., 720 (AR. 38–39, NR. 40).

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[19] Whenever reference is made to the House Interstate Commerce Committee Report, the reference is to the Report of the Committee on Interstate and Foreign Commerce of the House of Representatives, pursuant to H. Res. No. 59, 72d Cong., 1st Sess., and H. J. Res. No. 572, 72d Cong., 2d

(*b*) *Service Contracts.*—The respondent American Water Works and Electric Company in its bill affirmatively alleges it performs service contracts for its subsidiaries (AR. 4–5). Furthermore, North American Light and Power Company, an intermediate holding company which is itself a wholly owned subsidiary of the respondent North American Company, maintains extensive intragroup service contracts and arrangements within its own sub-holding company system according to the House Interstate Commerce Committee Report, Part 3, p. 743 (AR. 39, NR. 40). Only two of the Bond and Share defendants, Bond and Share itself (through its subsidiary Ebasco Services, Incorporated) and one intermediate company, the American Gas and Electric Company, perform, or are alleged by the Government to perform, service, sales, and construction contracts for their subsidiaries (AR. 50, NR. 52). None of the other Bond and Share defendants, including the other four principal intermediate holding companies (American Power and Light, National Power and Light, Electric Power and Light, and United Gas Corporation, each comparable in size to respondents' systems) is alleged to perform service contracts (AR. 110, NR. 112–113). Bond and Share itself performs service contracts for its subsid-

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Sess., House Report No. 827, Part 3. All references in this brief to such report were made in petitioners' briefs in both lower courts and appear in the Record in the affidavit of the Attorney General (AR. 36–40, NR. 37–41).

iaries only through a separately incorporated subsidiary (AR. 108–109, NR. 110–111). Like respondents' contentions (AR. 6, NR. 5), the Bond and Share pleadings assert that "none of said services * * * constitutes interstate commerce" (AR. 108, 110, NR. 111–113).

(*c*) *Control of Subsidiaries.*—Ignoring the existence of service contracts, respondents do not deny that they exercise such control by virtue of stock ownership over their subsidiaries as not to be entitled to any exemption from the Act under section 2 (a) (7), which provides exemptions for companies which do not control or exercise a controlling influence over operating utility companies (AR. 2–3, NR. 5–6). Similarly, the Bond and Share holding companies allege they are not entitled to exemption under section 2 (a) (7) (AR. 111–112, NR. 114). But just as the bill of complaint of each respondent alleges that each company in its system functions under the control of its own board of directors in accordance with the laws of the state in which it is incorporated (AR. 6, NR. 4–5), so the same technical defenses have been set up by the Bond and Share defendants (AR. 109–110, NR. 112). The respondents do not deny that by virtue of their stock ownership they control the election of the directors of their subsidiary companies (AR. 6, NR. 4–5). Similarly, Bond and Share defendants allege that they do not exercise any control over their subsidiaries except such as is inherent in stock ownership (AR. 82,

110, NR. 84–85, 113). The issue of control through ownership of voting securities[20] is, therefore, exactly the same in the suits against the Bond and Share companies, certainly as to those which have no service contracts, as in respondents' suits.[21]

As the Government pointed out to the trial court, the real fallacy in these alleged factual differences in the two sets of cases lies in the fact that the Government is proceeding not against Bond and Share Company alone but against a whole group of differently circumstanced holding companies, and is attempting to establish the duty of each such company to register as a holding company in its own right.

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[20] A holding company is distinguished from an investment company by the control it exercises over its subsidiaries. Control is an evasive factor often difficult to prove. The Act makes a specified percentage of voting stock ownership presumptive evidence of control and of the existence of the holding-company relationship. But machinery is provided so that a putative holding company may prove to the Commission that it does not exercise control or a controlling influence over another holding or utility company and that it is not therefore a holding company within the meaning of the Act (Section 2 (a) (7)).

[21] If statutory responsibility can be evaded by the multiplication of corporate subsidiaries, any and all holding-company regulation becomes self-defeating. If a holding company can escape the provisions of the Act relating to intra-system service contracts by handling its service contracts through a subsidiary one or two degrees removed from it, then attempts at holding-company regulation can result only in more, rather than less, corporate obfuscation. These issues are clearly raised in the Bond and Share suits just as they are raised in the respondents' suits.

Certainly if a stay can ever be justified on the ground that the final outcome of litigation instituted in another court of parallel jurisdiction under the same sovereignty will reduce substantially or eliminate altogether the issues in the stayed suits, it cannot be urged that the Record in this proceeding reveals any manifest abuse of the trial court's discretion in granting the stay.

B. THE TRIAL COURT HAD REASONABLE GROUND TO BELIEVE THAT THE BOND AND SHARE SUITS AFFORD A REASONABLE BASIS FOR A COMPREHENSIVE AND PROMPT TEST OF THE ACT

1. THE TRIAL COURT COULD REASONABLY FIND THAT THE BOND AND SHARE SUITS AFFORD THE BASIS FOR A COMPREHENSIVE TEST OF THE ACT

Certainly no more comprehensive test suits could have been arranged by the Government with any holding company or groups of holding companies than the Bond and Share suits. The Government did not select for suit simply one specially circumstanced company, but selected a super-system which within itself presented more typical situations affected by the Act than could be found in any other large multiple holding-company group. Certainly no reason has been adduced to show that the trial court was arbitrary or unreasonable in regarding the Bond and Share suits as comprehensive and appropriate test suits.

The prevailing opinions of the Court of Appeals did not deny that as test suits the Bond and

Share suits were fair or comprehensive, but proceeded on the theory that each company had a right to have its own case tried, subject only to such continuances as may be necessary to meet the convenience of the parties and that the trial court was without power to grant a stay which might relieve the court of the burden of unnecessarily long and protracted trials in numerous suits.

The respondents were unable to prove to the trial court that their own suits afforded a basis for a fairer or more comprehensive test of the Act than the Bond and Share suits. And not one of the opinions in the Court of Appeals so found.

The trial court expressly found that the Government's plan of procedure was fair and that it adequately safeguarded respondents' interests. There is nothing in the Record to justify a contrary finding, certainly nothing to warrant a disturbance of the District Court's finding.

2. THE TRIAL COURT COULD REASONABLY FIND THAT THE BOND AND SHARE SUITS AFFORD A PROMPT TEST OF THE ACT

In order that as many issues as possible might be determined in a single litigation, the Securities and Exchange Commission filed its suits against the principal Bond and Share companies to compel compliance with the Act on November 26, 1935, five days before December 1st, the deadline for registration under the Act. Certainly no prompter action could be asked of the Government.

The Government's motion for a stay (AR. 24, NR. 25), recited that the Government was eager to secure an early determination of the constitutionality of the Act, and to that end had already instituted proceedings against the principal Bond and Share holding companies. It recited the determination of the Government to prosecute those proceedings with all diligence to secure from this Court promptly an authoritative determination of the validity of the Act. It set forth that no public interest would be served by pressing for a decision of this issue in a multitude of suits, but to the contrary that such a course would make against an orderly and economical disposition of that controversy.

The Government was in a position to press the Bond and Share suits much more expeditiously than it could press a suit against any comparable holding-company system. Several years ago the Government had a suit against Bond and Share involving somewhat similar issues of fact. *Federal Trade Commission* v. *Smith,* 1 F. Supp. 247 (S. D. N. Y. 1932). After extensive study and negotiation, a stipulation of facts was agreed upon in that case. The chief counsel for the Government in that litigation is now a member of the Securities and Exchange Commission, and was in a position to make available to the Commission the results of his months of labor on the earlier suit.

The Commission undertook to develop intensively the further facts necessary for the prosecution of the Bond and Share suits. The Government had already done considerable work on the Bond and Share suits before the argument in the trial court. It has now been engaged for nine months in developing the facts. It has for months worked with counsel for the Bond and Share companies in the preparation of a detailed stipulation. The stipulation as signed runs without exhibits into three volumes and 639 pages, and with exhibits into seven volumes and 2,165 pages. The stipulation has been submitted to the district court, and the necessity of a long trial avoided. Elaborate and exhaustive principal briefs and reply briefs have been filed, and a decision of the district court may reasonably be anticipated by the turn of the year. The Government has undertaken and has prosecuted the Bond and Share suits with all possible diligence.

The record in the Bond and Share suits is full and complete. The parties have agreed to the incorporation in the record of all evidence that either party considered relevant so that there would be no necessity of this Court's ultimately remanding the suits for the taking of further evidence because of any dispute as to the scope of the issues. No comparable record could have been prepared in the respondents' suits in a shorter period of time.

3. THE TRIAL COURT COULD REASONABLY FIND THAT THE BOND AND SHARE SUITS AFFORD A MORE CERTAIN TEST OF THE ACT THAN DO RESPONDENTS' SUITS

The Bond and Share suits will more certainly provide a speedy adjudication by this Court than will suits brought by any non-registered company against Government officials on alleged equitable grounds to restrain enforcement of the Act and to have it declared a nullity. The suits instituted by the Government are expressly authorized by section 18 of the Act and are immune from attack on jurisdictional grounds.

The Bond and Share suits afford the defendant companies the opportunity—which they have utilized—to plead as a defense any provision of the Act that may possibly be relied upon by the respondents as a justification for their failure to register and their prayers for equitable relief. In setting up such defenses the defendants in the Bond and Share suits will not be embarrassed to the same degree as the respondents by the disclaimers of threats by the Attorney General, the Postmaster General, and the Commission (AR. 40–45, NR. 42–46), or by their own failure to register. For the Government is taking the initiative in proceeding against the Bond and Share companies, and they may plead that they are not legally obliged to register even if they could not affirmatively invoke the jurisdiction of equity to protect them from filing a simple notification of registration.

The Bond and Share suits further afford the defendant companies the opportunity—which they have utilized—to plead affirmatively by way of cross-bill any provision of the Act that may possibly be relied upon by respondents as a justification for their failure to register and their prayers for affirmative relief. The briefs filed by the Bond and Share companies assail not only the constitutionality of the Act as a whole but of each and every provision of the Act as respects not simply Electric Bond and Share Company itself, but the twenty-one other defendants in the Bond and Share suits. To the Government's knowledge there is no argument which has been advanced against the Act by the respondents which is not advanced against the Act by one or more of the Bond and Share companies in their suits. To the Government's knowledge there is no issue raised by the respondents which the Bond and Share companies do not contend they have a right to raise in their suits.

It is true that the cross-bill of the Bond and Share companies may run against the same jurisdictional obstacles as stand in the way of the respondents' suits. As a matter of fact the Government has filed with the District Court for the Southern District of New York a separate brief on the scope of the issues, a major part of which is devoted to showing that the cross-bill of the Bond and Share companies is jurisdictionally defective; but every objection raised by the Government to

the Bond and Share cross-bill would apply with the same or greater force to the respondents' independent bills. If, however, the Bond and Share cross-bill fails for jurisdictional reasons, the Government's bill of complaint would still stand free of jurisdictional difficulties; while if the respondents' independent bills should fail for the same jurisdictional reasons, no decision on the validity of the Act or any part thereof could be obtained in respondents' cases. There can be no question that when the Bond and Share suits reach this Court, not only will the important and disputed jurisdictional questions be decided with finality, but there will also be decided—by reason of the Government's bill of complaint and the defendants' defense—the substantive issues of the constitutionality and separability of the registration provisions. There is not the danger, as there is in the respondents' cases, that after protracted trials the suits may be dismissed upon grounds of equitable jurisdiction without any consideration of the substantive constitutional issues.

C. THE STAY, AS GRANTED BY THE TRIAL COURT, DOES NOT EXPOSE THE RESPONDENTS TO ANY DAMAGE FROM WHICH A PERMANENT DECREE OF THAT COURT COULD PROTECT THEM

The prevailing opinions in the Court of Appeals proceeded on the assumption that it was necessary to the protection of the rights of the respondents to have their suits tried before a comprehensive test

suit had been disposed of on appeal by this Court. But if the respondents were entitled to have their cases tried without awaiting the outcome of an appeal in a test case, every company affected by the Act would have a similar right. Even the respondents, as we shall point out, did not venture to argue before the trial court or the Court of Appeals that it was necessary or even desirable that all the suits which had been instituted or which might be instituted against the petitioners should be tried (see pp. 77–79, *infra*). Even the respondents hesitated to rest their case completely and unqualifiedly on the naked and technical ground that the court was without any power to relieve the calendar from the trial of a multitude of essentially similar suits.

Justice Stephens pointed out in his dissenting opinion in the Court of Appeals (AR. 222–223), NR. 226):

> The right of the plaintiffs to be heard with reasonable promptness was not the only right involved in the administrative problem confronting the trial court. There was also the right of third parties—the plaintiffs and defendants in the various cases, civil and criminal, in the usual course of the judicial business of the Supreme Court of the District of Columbia—to seasonable trials; and there was, in addition, the right of the public through its agents, the defendants, to an adequately presented defense of the cases brought by the plaintiffs locally and of the many other similar cases not un-

> likely to be tried locally, and to an adequate and comprehensive test of the constitutionality, in the New York suit, of a statute of great public significance. Whatever solution of the administrative problem the trial court reached would affect all of these rights. It was inevitable from the very nature of the problem that at least one of them would be to some extent impaired. The exercise of the plaintiffs' right to a reasonably prompt day in court had, obviously, to a large extent been made unnecessary by the agreement of the defendants not to enforce the statute—this agreement to be made good by injunction if necessary; that is to say, the plaintiffs had in large part gained by this agreement what they would have gained by immediate and successful prosecution of their causes.

If the trial court had any discretion, it cannot be said that the considerations to which Justice Stephens refers were irrelevant. The prevailing opinions took for granted the fact that the business of the respondents would be materially affected by the Act until the constitutionality of the Act was finally determined. But the prevailing opinions of the Court of Appeals overlooked the fact that the constitutionality of the Act as to the future could be finally determined no more by a permanent than by a temporary decree of the trial court. Such a final determination could be obtained only from this Court.

So far as a decree of a court of equity is valuable to the respondents for its own sake rather than as a vehicle of appeal to this Court, a temporary injunction or interlocutory decree will have the same effect during its pendency as a final decree. The respondents have not sued, nor can they sue, the United States. They have brought their suits not against the Act but against the petitioners. A temporary decree, which cannot be vacated unless and until the trial court becomes affirmatively satisfied that the decree is no longer warranted in fact or in law, will certainly give respondents the same protection against the petitioners as would a final decree.

Even if it were true, however, that the interlocutory decree of the trial court did not offer as complete or as effective protection to the respondents as a permanent decree of that court might offer, it could not be said that the trial court abused its discretion in granting the stay. Discretion is not a matter of rule but of judgment. Discretion involves the weighing of competing rights and conflicting interests. When many different and equally important interests are involved, trial procedure is not a matter of logic or abstract justice but of practical fairness. *Summum jus summa injuria.* In reviewing the action of the trial court, the question is whether the protection afforded was fair, whether the protection was as substantial as could be expected in view of

other demands upon the courts and upon the Government and in view of the rights of other suitors. But certainly it cannot be said that the trial court abused its discretion if there was any reasonable basis for the trial court's practical judgment that "final relief [of the trial court] would afford them [the respondents] little advantage over the temporary relief now offered them" (AR. 32-33), NR. 34), that "I [the trial court] cannot see how their [the respondents'] real interests will not be protected by the temporary injunction to which the defendants [the petitioners] offer to submit" (AR. 33, NR. 34), and that "the plan proposed by the defendants would give all the plaintiffs all the protection needed pending a decision by the Supreme Court and save great amount of labor, time and expense" (AR. 33, NR. 35).

1. RESPONDENTS HAVE NO RIGHT TO A PERMANENT DECREE MERELY AS A VEHICLE OF APPEAL TO A HIGHER COURT, AND THEY COULD NOT APPEAL A PERMANENT DECREE IN THEIR FAVOR

Respondents have no right to a declaration from the trial court or from this Court regarding the validity of an Act of Congress as such. Respondents' sole right, if any, in the instant cases is to protection by a court of equity from the alleged illegal conduct of Government officers. And when they receive that protection they have received all that a court of equity has power to give them. The Federal courts do not review Acts of Congress as such, but dispose of concrete

cases and controversies coming before them for adjudication. As this Court stated in *Adkins* v. *Children's Hospital,* 261 U. S. 525, 544: "From the authority to ascertain and determine the law in a given case, there necessarily results, in case of conflict, the duty to declare and enforce the rule of the supreme law and reject that of an inferior act of legislation which, transcending the Constitution, is of no effect and binding on no one. *This is not the exercise of a substantive power to review and nullify acts of Congress, for no such substantive power exists.* It is simply a necessary concomitant of the power to hear and dispose of a case or controversy properly before the court, to the determination of which must be brought the test and measure of the law."

To the same effect is this Court's statement in *Massachusetts* v. *Mellon,* 262 U. S. 447, 488: "*We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional.* That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. *It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right.*" See also *Ashwander* v. *Tennessee Valley Authority et al.,* 297 U. S. 288.

In any *bona fide* case or controversy, therefore, a party may ask a court in adjudicating that case or controversy to disregard a legislative act to the extent to which it conflicts with his alleged constitutional rights. But if the court finds that the statute conflicts with his constitutional rights, he cannot prosecute an appeal in order to obtain a more authoritative declaration of his rights to guide his future conduct. No one under our system of jurisprudence has a right to appeal from a decree in his favor for the purpose of having his rights declared by a higher court. *New York Telephone Co.* v. *Maltbie,* 291 U. S. 645.

2. A PERMANENT DECREE OF THE TRIAL COURT, JUST AS AN INTERLOCUTORY DECREE, WOULD HAVE TO YIELD TO THE LAW AS SUBSEQUENTLY DECLARED BY THIS COURT IN OTHER CASES

So far as it operates prospectively, a permanent decree of the District Court, no less than an interlocutory decree, would have to yield to the law as subsequently declared by this Court in other cases. If the respondents obtained a final decree in their favor from the trial court, they could not appeal from that decree. Yet that final decree would not protect the respondents in the event that subsequent decisions of this Court in other cases should establish that the decree had been based upon a rule of law different from that announced by this Court.

As the trial court pointed out (AR. 32–33, NR. 34):

> If this Court [the trial court] should hold the Act unconstitutional, the final re-

> lief would afford them [respondents] little advantage over the temporary relief now offered them. It would seem that injunctions against the present defendants might not bind their successors in office and if the Supreme Court should afterwards hold the Act Constitutional, their success in the instant suits would avail them little. *Ex Parte La Prade,* 289 U. S. 444.
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> Even a consent decree may be modified in invitum where the situation of the parties and conditions have so changed as to render the enforcement of the decree inequitable. *United States* v. *Swift & Company,* 286 U. S. 106. And in any event a bill of review for error of law apparent on the record would lie. *Rudolph* v. *Hunt,* 52 App. D. C. 343. The plaintiffs seek an early decision by the Supreme Court but they could not appeal from a decree of this Court in their favor, and as said before, I cannot see how their real interests will not be protected by the temporary injunction to which the defendants offer to submit.

It is clear that a permanent injunction or declaratory judgment, in so far as it operates prospectively, will be dissolved if subsequently in a different action this Court rules that the law upon which such injunction was based is not as the enjoining court held it to be.

"The great case of *Pennsylvania* v. *Wheeling & Belmont Bridge Company,*" 18 How. 421 (as it is fittingly described by Mr. Justice Gray in *Mills* v. *Green,* 159 U. S. 651, 655) is the leading authority

for this equitable doctrine. In that case, one of original jurisdiction in this Court, an injunction had been issued, at the request of the Commonwealth of Pennsylvania, to prevent the construction by the defendant of a bridge across the Ohio River which this Court found to constitute an unlawful interference with free navigation. Subsequently Congress by law authorized the construction of this particular bridge, and the defendant constructed the bridge. A bill was then brought by the Commonwealth of Pennsylvania to enforce the original injunction and to punish the defendant for contempt; the defendant moved to dissolve the injunction. This Court held that in equity the injunction should be dissolved and the defendant should not be punished for building the bridge in violation of the Court's original order, saying (18 How. at 431–432):

> * * * But that part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future existing or continuing obstruction depends upon the question whether or not it interferes with the right of navigation. If, in the mean time, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced.

The *Wheeling Bridge* case was followed by the Oregon Circuit Court in *Hatch* v. *Wallamet Iron Bridge Co.*, 27 Fed. 673 (C. C. Ore. 1886), a case which would be identical with respondents' cases had injunctions been issued by the trial court, and were this Court on appeal in the Bond and Share cases to uphold the Holding Company Act. In the *Hatch* case, the circuit court had earlier enjoined petitioner from constructing a certain bridge, which the court found an obstruction to free navigation in violation of the Act of Congress admitting Oregon to the Union. Subsequently, in an entirely different suit, arising not under the Act admitting Oregon but under a similar statute admitting California to the Union, this Court had decided that the statute did not prevent construction of a similar bridge. The defendant in the Oregon suit then asked the circuit court to dissolve the injunction. The court refused this request solely on the procedural point that the question could not be raised in the particular manner, but indicated that the petitioner would have a defense to any suit which might be brought against him for violating the injunction. The court explicitly referred petitioner to the authority of the *Wheeling Bridge* case, stating (27 Fed. at 674):

> Upon the authority of these two cases it is my opinion that if the law applicable to this matter has been changed, or ascertained to be different from what the court apprehended it to be, the question will properly

> come up on an application to enforce this decree, and, as I have said, the further question will come up as to whether this bridge was the same that was enjoined. I am unable to do more than to dismiss this petition with these suggestions, leaving the parties to bring the matter before the court in the way I have indicated.

It is unimportant, for the purpose of the instant proceedings, whether the proper procedure for the setting aside of a continuing decree as regards future action, because the conditions upon which it was based are altered by subsequent decisions of this Court, be by a petition to vacate or modify, by a bill of review, or otherwise. Possibly in some cases more than one procedure is available. As pointed out, this Court granted a motion to vacate in *Pennsylvania* v. *Wheeling & Belmont Bridge Company,* 18 How. 421, and in the *Hatch* case, while the circuit court had earlier held that a bill of review was not the proper procedure (*Wallamet Iron Bridge Co.* v. *Hatch,* 19 Fed. 347 (C. C. Ore., 1884)), this Court, on an appeal from that earlier ruling which was pending when the subsequent application in the circuit court to vacate was made, held that a bill of review was proper and reversed the circuit court (*Willamette Iron Bridge Co.* v. *Hatch,* 125 U. S. 1).[22]

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[22] The authorities cited by respondents in the Court of Appeals are entirely inapplicable, because they relate not to continuing decrees but to decrees or judgments which have been executed. Of course, if a court decides that one party

The power to dissolve or modify a continuing decree—whether it be permanent or interlocutory—in so far as it relates to future acts, after the conditions on which it was based are altered by the decisions of this Court declaring the law applicable to such situations, is "inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *United States* v. *Swift & Co.*, 286 U. S. 106, 114.

3. RESPONDENTS HAVE THEMSELVES SUGGESTED THAT TEMPORARY INJUNCTIONS WOULD PROTECT THE HOLDING-COMPANY INTERESTS PENDING THE DISPOSITION OF TEST SUITS

If the majority of the Court of Appeals were correct in holding that respondents could not be sufficiently protected by a temporary injunction pending the disposition of the Bond and Share suits to justify the granting of the stay, it would follow that other suitors could not be sufficiently protected by a temporary injunction pending the disposition of the respondents' suits. Yet re-

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and not another has legal title to land, that judgment is *res adjudicata* in any subsequent litigation between the parties. *Southern Pacific Railroad Company* v. *United States*, 168 U. S. 1. Or if contraband liquor is taken from a carrier by legal proceedings, the carrier is protected by that decree from a later suit for failing to deliver the liquor. *American Express Co.* v. *Mullins*, 212 U. S. 311. The Government has never suggested that either a permanent or an interlocutory decree, *during the period of its effectiveness*, would not protect the respondents.

spondents did not urge that it was necessary or even desirable that all the suits against the petitioners should be tried. To the contrary, counsel for the respondents stated to the trial court: "I undertake to say that it will not be difficult for us [presumably himself and Government counsel] to agree upon a group of three or four cases which will present every question that is involved in this multitude of suits, so that every one of these companies may be satisfied that its rights will be promptly determined" (AR. 193, NR. 197). But once it is recognized, as respondents themselves have recognized, that the rights of other suitors may be adequately protected by temporary injunctions pending the final disposition of appropriate test suits, the Government submits that the rights of such suitors including the respondents may similarly be adequately protected pending the final disposition of the Bond and Share suits.

The respondents are unable to deny that the burden placed upon the courts by the trial of fifty suits all contesting the validity of the Holding Company Act is unwarranted and should be avoided. *They do not deny that, if respondents' suits were tried, the other holding companies would be fully protected in the meantime by a stay and temporary injunction.* Obviously, therefore, the demand by respondents for a trial of their own suits is made for reasons other than their fear that they would not be fully protected by an interlocutory decree. Every sizeable holding company

might, if it cared to, make a similar demand that *its* suit be tried. Every large holding-company system is necessarily a corporate enterprise of considerable magnitude and complexity, differing in some detail from all others. But no one company has a right to insist that the Government join with it in making its suit a test case and to clog the calendars of the courts with numerous test suits when one should suffice. The only claim of the respondents cognizable in a court of equity is to have their constitutional rights protected from invasion by the unlawful and tortious acts of others. If a stay and interlocutory decree will protect their alleged constitutional rights from such invasion, respondents have no right, constitutional or otherwise, to insist that their cases be carried to this Court.

4. AN INTERLOCUTORY DECREE OF THE DISTRICT COURT AFFORDS THE RESPONDENTS AS COMPLETE PROTECTION AS A PERMANENT DECREE OF THAT COURT

The stay-order was granted subject to all the terms and conditions set forth in the opinion of the trial court. That opinion offered the respondents an interlocutory decree, if they wished it, although the trial court did not think a formal decree necessary in view of the petitioners' assurances that they would not seek to enforce the Act against the respondents during the pendency of the stay (AR. 33, NR. 35). The Government had consented, and has at the present time no objection, to the issuance in respondents' favor of an inter-

locutory decree in the same form and of the same scope as a final decree. The respondents either have not chosen or have not deemed it necessary to take advantage of these offers.

Although the bills of complaint of the respondents allege, in vague and general terms, threats of enforcement on the part of the petitioners (AR. 16, 17, NR. 2, 21–22), petitioners had in fact made no threats and had publicly and officially disclaimed any intention to enforce the Act pending a final decision as to its validity by this Court (see pp. 11–12, *supra*). Since, however, the legal effect and factual consequences of these disclaimers were disputed by the respondents, it might be urged that on the motion to stay the threats alleged in the bills could not be wholly ignored. It was for that very reason that the Government did not urge that the respondents be obliged to rely upon the petitioners' formal and public disclaimers, but offered further to submit to an interlocutory decree. The Government submits that such an interlocutory decree can certainly protect the respondents, as effectively and fully as any permanent decree, from any alleged damage, irreparable or otherwise, which they may be suffering by reason of any alleged action or threat of action on the part of the petitioners.

In their answer to the petition for writs of certiorari in the present cases (p. 14), respondents contend that "until the Act is *finally* declared to be unconstitutional as against these respondents

[assuming it to be unconstitutional, as their bills allege], the cloud which its existence on the statute books will cast on the validity of practically every important act done by them in their essential corporate activities will practically paralyze the normal conduct of their business." But apart from any action or threat of action on the part of the petitioners which would be effectively stayed by an interlocutory decree, any cloud of illegality upon respondents' businesses springs not from any acts or threats or color of authority of the petitioners but from the Act itself. But respondents have brought their suits against the petitioners, not against the Act. If a cloud of illegality exists, it springs from section 26, which merely enacts the common law rule, making void as regards third persons contracts made in violation of law. And neither a permanent nor a temporary decree of the District Court against the petitioners can protect respondents against the rights of third persons not parties to the proceeding. The petitioners have no power either to enforce or to abrogate section 26; and the suits brought by the respondents against petitioners cannot remove a cloud which petitioners have neither created nor have the power to remove.

It is clear, therefore, that in so far as any permanent decree of the District Court in a proceeding against the petitioners could protect respondents, respondents can obtain that same protection from an interlocutory decree having like force and effect

during its pendency.[23] So far as future effectiveness is concerned, a permanent decree of the District Court no less than an interlocutory decree would have to yield to the law as subsequently declared by this Court in other cases (see pp. 72–77, *supra*).

Respondents realize that they must run the risk that a permanent as well as an interlocutory decree of the District Court will be opened up to comply with the law as declared by this Court. Respondents are interested in a permanent decree against the petitioners not for its own sake but as a vehicle of appeal to this Court. But respondents as a matter of right are entitled to no more than the protection by a decree of the District Court.

If the respondents have the right to have their cases taken to this Court, every other holding company may claim a similar right. Indeed, at the time the stay was applied for and granted, it seemed evident that many holding companies

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[23] As was pointed out to the trial court and the Court of Appeals, if respondents' suits proceeded to trial and if respondents failed to establish any action or threat of action on the part of the petitioners against the respondents, the very serious question would arise whether there was any case or controversy between the respondents and the petitioners on which the jurisdiction of the court to render a permanent decree could be predicated. *Ex parte La Prade*, 289 U. S. 444; *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70; *Ashwander* v. *Tennessee Valley Authority et al.*, 297 U. S. 288. This very question will be presented to this Court when this Court comes to consider the cross-bill in the Bond and Share suits.

would claim that right unless the Government handled the test litigation in a manner dictated by the holding companies. The trial court found that the plan of the Government was fair and conducive to the orderly administration of justice and afforded respondents complete protection of their rights.

5. THE STAY AS ALLOWED NOT ONLY GIVES TO THE RESPONDENTS IMMEDIATELY THE RELIEF THAT THEY HAVE PRAYED FROM THE TRIAL COURT, BUT CANNOT POSSIBLY PREJUDICE OR MAKE MORE DIFFICULT THE ESTABLISHMENT OF THEIR ALLEGED RIGHTS TO PERMANENT RELIEF IN THE EVENT THAT THE BOND AND SHARE SUITS DO NOT WHOLLY ELIMINATE THE NECESSITY OF A TRIAL

How can the respondents possibly be prejudiced by the granting of the stay? The usual ground for opposition to a stay is the practical ground that the party opposing the stay during its pendency is deprived of the relief which he is seeking. Here, as has been shown, the respondents are given the right by the terms of the stay-order to all the relief which they have sought against the petitioners; and, so long as the stay is effective, petitioners can neither take any action nor make any threat against the respondents under the Act. Respondents' alleged right to relief has not been either suspended or deferred; it has been *granted*.

The respondents seek to draw an analogy between the action of the trial court in their cases and that of the New York court in *Sliosberg* v. *New York Life Insurance Co.*, 244 N. Y. 482

(1927). But the *Sliosberg* case involved a *statutory* stay, until after the recognition of the Russian Government, of a legal cause of action to recover on an insurance policy payable in Russian rubles. Not only was the right of the plaintiff to recover indefinitely suspended, but the plaintiff was not given, during the pendency of the stay, possession of, or the right to use, the money which he was claiming. To the contrary, during the stay he was deprived of the decree or judgment which he would have obtained under a permanent decree, and the defendant was free to use and enjoy the money it owed to the plaintiff. Moreover, the plaintiff's cause of action in the *Sliosberg* case depended upon the proof of certain past events, and it might well have become much more difficult for him years later to prove his right to recover. Respondents herein, on the other hand, are not concerned with past events, but solely with the future operation of the Act.

Indeed, a recognized ground frequently and properly urged against a stay is that the delay will prejudice the litigant's ability to prove his case. His witnesses may die, their memories fade, the records on which he relies may be lost or destroyed. But no such considerations are applicable here. If a limited trial of the suits brought in the trial court should ever become necessary, the burden upon the respondents will be no more difficult a year from now than it is today, their means of defense would be neither lost nor impaired. In

fact, after the trial of the Bond and Share suits, if there be need for any trial of respondents' cases, the burden upon respondents of establishing their causes may be much less onerous than at the present time. In these circumstances and in view of the fact that a temporary decree gives to respondents all the protection which a court of equity can give them, there can be no doubt that the stay did not and could not injure respondents and that the District Court's issuance of the stay cannot be regarded as arbitrary or unreasonable.

D. THE ACTION OF THE GOVERNMENT IS NOT LESS FAIR OR LESS CONDUCIVE TO THE ORDERLY TESTING OF THE ACT THAN THE ACTION OF THE RESPONDENTS

There is nothing in the prevailing opinions of the Court of Appeals to suggest that the action of the Government is less fair or less conducive to the orderly testing of the Act than the action of the respondents. The trial court found the contrary (AR. 33, NR. 34–35). And Justice Stephens in his dissenting opinion stated (AR. 223, NR. 226–227):

> But a decision to the contrary, denying the stay, would have impaired the other rights involved: For the court to deny the stay was for the court to bring on for trial the plaintiffs' cases, complex and burdensome, not unlikely the five similar cases already filed locally, not unlikely forty-nine others filed elsewhere but without jurisdiction of the defendants, and not inconceivably many

> more. Under the plaintiffs' theory each utility must in its own protection present its own case on its own facts. This would be to clot the flow of justice and to defer the day in court of the third party plaintiffs and defendants seeking to litigate their causes, civil and criminal; and this would be to engage the Commission and its counsel on so many legal battle fronts at once as likely to make inadequate their preparation and presentation of a defense in the local suits, and their preparation and presentation of a plaintiff's case in the comprehensive test suit in New York. Moreover, in no effective manner could such impairment of the rights of third parties and of the public be minimized by the plaintiffs or by the court as was impairment of the plaintiffs' right minimized by the defendants—so far as enforcement of the statute is concerned—through the agreement of non-enforcement, and, virtually by the court, through injunction.

The prevailing opinions in the Court of Appeals did not suggest that the respondents' suits offered a fairer test of the Act, but were based on the theory that each holding company had a right to a prompt trial of its own case without regard to the fact that fair and comprehensive test suits were already under way and that the protection of an interlocutory decree was available to each such holding company during the pendency of the test suits.

The respondents sought to intimate that the Bond and Share suits were not fair and reasonable test suits and charged the Government with "hand-picking" the Bond and Share suits as "its own particular case, in a court of its own choosing, and involving only one or two narrow issues of its own devising" (AR. 29, NR. 30). The Bond and Share system is one of the best known and one of the oldest of the great public-utility holding company systems in the country. The Government did not single out the top holding company or any specially circumstanced holding company in that system, but sued all of the principal holding companies in that large system. The Government brought its suit in the only district where service could be obtained on all of the defendants and in the only district where the Government would have effective power to subpoena the necessary witnesses and the necessary records.

In contrast to the Government's care in bringing an entire holding company system before the United States District Court for the Southern District of New York, it is significant that neither The North American Company nor American Water Works and Electric Company has chosen to join all of the principal holding companies in its system in its suit, and that other holding companies in each of these systems have actually brought suits outside of the District of Columbia (AR. 39, NR. 40).

Neither of these systems has submitted itself as a whole to the jurisdiction of the trial court. Their records and their witnesses are within their control but are not within the effective reach of the trial court. A subsidiary of American Water Works and Electric Company, West Penn Electric Company—a large intermediate holding company which controls all the electric-utility properties in the American Water Works and Electric Company system—has brought suit in Baltimore (AR. 39, NR. 40). North American Edison Company and North American Light and Power Company, two large intermediate holding-company systems within the so-called "North American system," and one of which at least was represented by the same counsel as represent The North American Company in this Court, have brought suit in Wilmington (AR. 39, NR. 40).[24] While respondents have already offered to transfer to the District of Columbia the suits which their subsidiaries have brought in other districts,[25] the plaintiffs in those

[24] Likewise, the other plaintiffs in the trial court are but parts of holding-company systems which, through other companies, have instituted proceedings outside of the District of Columbia. The Tennessee Electric Power Company is a subsidiary of the Commonwealth and Southern Corporation, which has instituted proceedings in Wilmington. The other plaintiffs before the trial court are members of the United Light and Power system, a subsidiary of which has instituted proceedings in Columbus, Ohio (AR. 39, NR. 41).

[25] This offer to transfer suits is at least some indication that it is not unlikely that other companies who have brought suits outside the District of Columbia will, when their suits are dismissed for defective service, recommence them within the District if the stay is finally vacated.

suits do not comprise all the important units in respondents' systems. New Empire Corporation and Central States Electric Company, which are part of the North American system, have not as yet offered to intervene. House Interstate Commerce Committee Report, Part 3, p. 719 (AR. 39, NR. 40). To bring in all these companies would present a series of suits equally complicated but no more typical than the Bond and Share suits.

Apart from the fact that the Record is barren of proof that the respondents' suits are more appropriate for test suits than the Bond and Share suits, and apart from the fact that respondents have failed to show that they are affected by the Act in any respect materially different from several intermediate Bond and Share holding companies which perform no service contracts for their subsidiaries, and which, like the respondents, are not operating companies but transmit electric energy and gas across state lines only through subsidiary companies, the respondents contend that the petitioners have been unfair in refusing to engage in battle with them. The respondents urge that a few more suits will not overtax the Government's facilities. But the question involved is more than the physical overtaxing of the Government's facilities, which was very real when the Government was confronted with a concerted multiplicity of suits all over the country, and with the possibility of the transfer of all of these suits to the District of Columbia. The question was not merely one of

the Government's engaging a few more lawyers to fight these suits as an insurance company might fight suits for personal injuries. There was the more important and far-reaching question whether it was a justifiable burden upon our judicial machinery to have the courts' calendars unnecessarily clogged with a multitude of suits brought for a common object and whether contemporaneous trials of numerous such suits were conducive to the fair and consistent presentation to the courts of the constitutionality of an important Congressional enactment.

The preparation and trial of each of these suits was comparable in magnitude to an important anti-trust case. It would have been an unnecessary burden upon the trial court and a wasteful and unjustified abuse of the court's process for the very same issues of jurisdiction and substantive law to be fought out in several different suits, each of which would of necessity require the most elaborate factual record, when one comprehensive test case carried to this Court could eliminate all or virtually all of those issues.

The affairs of each of the respondent holding-company systems are intricate and complex, their functioning cannot be understood without careful study. The facts regarding these systems are peculiarly within the knowledge of their management and their counsel and cannot be readily and quickly disentangled and established by legal proof by adverse counsel.

Respondent North American Company has asserted that it would cost it and its subsidiary companies substantially in excess of $50,000 merely to prepare registration statements containing the information which the Commission might reasonably require to be filed under section 5 (NR. 16). Since the respondent systems are, by respondents' own admissions, of such size and intricacy that the preparation of simple statements of facts and figures readily available to the respondents would involve very substantial labor and expense, how much greater will be the labor and expense upon the courts and the Government in preparing and trying either of the respondents' suits? A proper presentation of facts in such circumstances would require months of investigation.[26] It would proba-

[26]A cursory examination of respondents' long and exceedingly complicated complaints and of the careful way in which their allegations have been framed will further indicate how much of a burden the trial of a single one of these suits will put upon the courts and the Government. An example may be found in the bill of complaint filed by The North American Company (NR. 3–4). Every effort has been made in drafting the complaint to give the impression that the North American subsidiaries are engaged solely and exclusively in an intrastate business. In paragraph (h) of section IV of the complaint, it is alleged that "none of the 'public utility companies' or 'holding companies' or other companies *in which plaintiff owns any stock*, engages in or employs any of its properties in the generation, transmission or distribution of electric energy in interstate commerce" (NR. 4). This allegation may be literally true, but it is entirely misleading. Literally, the allegation merely states that no company *directly below North American* in the corporate structure of the entire North American

bly take six months to build a record in either of these suits comparable to the record built in the Bond and Share suits, upon which the Government has had a corps of men working for nearly a half

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system transmits electric energy in interstate commerce. But in effect the allegation gives the impression that no company anywhere in the North American system under the control of the North American Company is so engaged in interstate commerce.

Such an impression is false. For example, The North American Company does not "*own any stock in*" Union Electric Light and Power Company, of St. Louis, the largest integrated operating group in the North American system; but North American does own all, or almost all, of the voting stock of North American Edison Company, its principal subholding company, which in turn owns one hundred per cent of Union Electric Light and Power Company. This latter company through itself and its subsidiaries, most of which are wholly owned, conducts a substantial business in Missouri, Iowa, and Illinois. And it transmits and sells its power from the Keokuk Dam in Illinois down through Illinois into Missouri and Iowa. Furthermore, North American, through intermediary holding companies, also controls other companies engaged to a substantial degree in the transmission of electric energy across state lines. Indeed, of the total electric energy generated and sold by the North American system, approximately one-fifth is sold in interstate commerce (AR. 38–39, NR. 40).

But those facts do not appear in the complaint filed by The North American Company in the trial court, and, in fact, would seem to be expressly denied until one examines the allegations of denial in the complaint and finds them to be so drafted as to be narrower than they seem. Just this single illustration of the difficulties lurking in a single allegation in a long and complicated bill of complaint indicates the gravity of the task of preparing to defend and of trying either of these suits.

year, assuming that counsel could amicably agree upon a stipulation without a long trial. By the time the trial court would have reached its decision, this Court would have disposed of the Bond and Share suits and would have resolved all the bitterly contested issues of law. The courts' time, the Government's time, and the respondents' time would have been wasted, and the rights of other suitors in other civil and criminal cases would have been delayed.

Respondents have repeatedly shifted their position, maintaining one moment that they are entitled to the immediate trial of their suits in their own right whatever be the consequent burden upon the courts and the Government, and maintaining the next moment that the multiplicity of suits which has resulted is the Government's own contriving, because the Government has not accepted "offers which had previously been made to Government counsel by counsel for the respondents and by representatives of the utility industry to arrange for the selection of a few representative test cases to be consolidated for trial" (answer to the petition for writs of certiorari, p. 7).

Respondents submitted no evidence to the trial court of the nature of these alleged offers of the industry. And the renewal of these alleged offers by counsel for the respondents in the trial court was as illusory as the original offers. Respondents' counsel simply stated that "I undertake to say

that it will not be difficult" for counsel for the Government and counsel for the respondents "to agree upon a group of three or four cases which will present every question that is involved in this multitude of suits, so that every one of these companies *may be* satisfied that its rights will be promptly determined—consolidate them all in one case, in one court, and try them out" (AR. 193, NR. 197). This expresses counsel's opinion that it would not be difficult for the industry and the Government to agree on test suits. But respondents' counsel could not assure the Government that every company would be satisfied with test suits of his selection.

If the industry were desirous of avoiding unnecessary litigation, it is difficult to understand why more than forty suits should have been brought against Government officers to restrain the alleged enforcement of the Act (AR. 77–79, NR. 79–81), after the Attorney General on November 21, 1935 (AR. 40, NR. 42) and the Commission on November 22, 1935 (AR. 43–44, NR. 45) had announced that they would not attempt to enforce the Act pending the outcome of test suits brought by the Government. For that matter, if the respondents themselves were eager to avoid unnecessary litigation, it is difficult to understand why they not only brought suits in the District of Columbia, but also through their subsidiaries in other districts. The conclusion is inescapable that the

willingness of the respondents and the rest of the industry to avoid unnecessary litigation was conditioned upon the Government's accepting such suits as might serve their prearranged plans. Cf. *Burco, Inc.* v. *Whitworth et al.*, 81 F. (2d) 721 (C. C. A. 4th, 1936), *cert. den.*, 297 U. S. 724.

The Government did not ask that these respondents be denied their day in court; the Government simply asked that their cases be deferred and their real interests properly safeguarded until the typical test cases the Government has commenced are disposed of finally by this Court, because that disposition will most certainly greatly reduce, if not eliminate, the trials of respondents' cases. It may be true that there are companies other than the Bond and Share companies which could have been chosen for test cases. The Government, however, was in no position, nor had it a duty, to try all the cases which might appropriately have been chosen as test cases. The trial court was not unreasonable in its concern to relieve the Federal judicial administration of the unnecessary and very real burdens of protracted trials in numerous cases, all having a common purpose.

The judgment of the trial court offers the respondents an interlocutory decree which will as fully protect them during the pendency of the Bond and Share suits as could any permanent decree of the trial court, and offers respondents

their day in court before such interlocutory decree can be vacated. It is very strange that respondents should regard this procedure of interlocutory injunction adequate to protect the constitutional rights of other companies, if respondents' cases are taken as test suits, but not adequate to protect their own rights if the Bond and Share cases are so taken. It is a novel suggestion that those who violate a statute on the grounds of alleged unconstitutionality should have the right to dictate to the Government against which violator the Government should proceed for the purpose of testing the constitutionality of the statute.

Private rights are entitled to protection. But private interests have no claim to obstruct the orderly administration of justice. Private and public interests alike require that broader considerations enter into the treatment of initial constitutional litigation on statutes of far-reaching public importance than into the treatment of exclusively private litigation. As Mr. Chief Justice Taney, in the celebrated case of *Charles River Bridge* v. *Warren Bridge,* 11 Pet. 420, 548, eloquently stated: "While the rights of private property are sacredly guarded, we must not forget, that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation."

CONCLUSION

The petitioners respectfully request that the judgment of the Court of Appeals for the District of Columbia be reversed.

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